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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

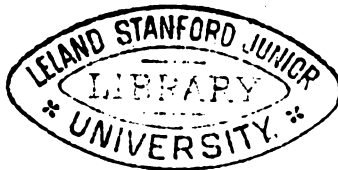
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C. P. POMEROY,
REPORTER.

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ORGANIZATION OF SUPREME COURT.

[Constitution, article 6, section 2.]

§ 2. The Supreme Court shall consist of a chief justice and six associate justices. The court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any

four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

SUPREME COURT COMMISSIONERS.

[Statutes 1897, page 47.]

SECTION 1. The Supreme Court of the State of California shall immediately upon the expiration of the term of office of the present Supreme Court Commissioners appoint five persons of legal learning and personal worth as Commissioners of said Court. It shall be the duty of said Commissioners, under such rules and regulations as said Court may adopt, to assist in the performance of its duties and in the disposition of the numerous causes now pending in said Court undetermined. The said Commissioners shall hold office for the term of two years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a Judge of said Court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the Constitution of the United States, and the Constitution of the State of California, and to faithfully discharge the duties of the office of Commissioner of the Supreme Court to the best of their ability. The said Court shall have power to remove any and all members of said Commission at any time by an order entered on the minutes of said Court, and all vacancies in said Commission shall be filled in like manner.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

[S. F. No. 583. Department Two—September 3, 1897.]

**MUTUAL ELECTRIC LIGHT CO., Appellant, v. THOMAS
ASHWORTH, Superintendent of Streets, etc., et al., Re-
spondents.**

**MUNICIPAL ORDINANCE—OBSTRUCTION OF STREETS WITHOUT PERMIT—REFUSAL
OF PERMIT—PERMIT TO RIVAL COMPANY—POSTS FOR ELECTRIC LIGHTING—
INJUNCTION—REMEDY TO COMPEL PERMIT.**—An ordinance which requires
a special permission to be obtained from the board of supervisors,
before the streets can be obstructed, is reasonable; and although an
electric lighting company was unjustly refused permission to erect
posts upon the streets for purposes of electric lighting, and such re-
fusal was an unfair and unjust discrimination against such com-
pany, and in favor of a rival company to which such permission had
been granted, yet an injunction will not lie in favor of the company
to which the permit was refused, to restrain the superintendent of
streets and the city from interfering with the erection of such posts
without a permit, its only proper remedy being to compel the grant-
ing of a permit in a proper case.

APPEAL from an order of the Superior Court of the City and
County of San Francisco refusing an injunction. J. M. Seawell,
Judge.

The facts are stated in the opinion of the court.

M. M. Estee, for Appellant.

It was lawful for plaintiff to use the public streets of San
Francisco for electric lighting purposes. (Const., art. XI, sec.
19.) Being lawful its acts could not be a nuisance. (Civ.

Code, secs. 3479, 3482; *Marini v. Graham*, 67 Cal. 130; *Ex parte Taylor*, 87 Cal. 91; *Vernon v. Voegler*, 113 Ind. 325; *Miller v. New York*, 109 U. S. 385; *Commonwealth v. Capp*, 48 Pa. St. 53.) Section 19, article XI, of the constitution, is self-executing and binding upon every department of the government, state and municipal. (*Ewing v. Oroville Min. Co.*, 56 Cal. 654; *Spring Valley Water Works v. San Francisco*, 61 Cal. 18, 24, 25; *People v. Stephens*, 62 Cal. 209, 234-36; Const., art. I, sec. 22.) A city has no right to create a monopoly without express authority. (*Saginaw Gas Light Co. v. Saginaw*, 28 Fed. Rep. 529; *Jackson etc. R. Co. v. Interstate etc. Ry. Co.*, 24 Fed. Rep. 306; *New Orleans etc. R. Co. v. Crescent City R. Co.*, 12 Fed. Rep. 308; 5 Fed. Rep. 160; *Norwich City Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19; *City v. Cincinnati Gas Light Co.*, 18 Ohio St. 262; *Grand Rapids etc. P. Co. v. Grand Rapids etc. Gas Co.*, 33 Fed. Rep. 659.) A city ordinance which unfairly discriminates between competing companies is void. (*Chicago v. Rumpff*, 45 Ill. 90; *Tugman v. Chicago*, 78 Ill. 405; *Ex parte Chin Yun*, 60 Cal. 78; *Ex parte Frank*, 52 Cal. 606; *Tarkio v. Cook*, 120 Mo. 1; *Davis v. Anita*, 73 Iowa, 325; *Ex parte Burnett*, 30 Ala. 461; *Austin v. Murray*, 16 Pick. 121; *Milhau v. Sharp*, 17 Barb. 435; *Dunham v. Trustees of Rochester*, 5 Cow. 462; *Mayor etc. v. Thorne*, 7 Paige, 261.)

Henry T. Creswell, City and County Attorney, and Galpin & Zeigler, for Respondent.

Section 19 of article XI of the constitution confers no right to erect posts in the streets, but is limited to the laying of pipes and conduits, under a proper construction of the language used. (Sutherland on Statutory Construction, 219-79, 326; *State v. Green*, 24 Mo. App. 227; *Albertson v. State*, 9 Neb. 429; *State v. Trenton*, 38 N. J. L. 64; *People v. Wells*, 11 Cal. 329; *Hoey v. Gilroy*, 129 N. Y. 132; *Smith v. Stephens*, 10 Wall. 321; 23 Am. & Eng. Ency. of Law, 446.) A post on the street is an obstruction and a nuisance, unless legalized by municipal authority. (*Commonwealth v. Boston*, 97 Mass. 555.) Any unlawful obstruction of a sidewalk is a nuisance. (*Marini v. Graham*, 67 Cal. 130; *Ex parte Taylor*, 87 Cal. 91; *Bonnet v. San Francisco*, 65 Cal. 230; *Ex parte Casinello*, 62 Cal. 538; *Young v. Inhabitants etc.*, 9 Gray, 386.)

TEMPLE, J.—This is an appeal from an order refusing an injunction. The action was brought for the purpose of obtaining an injunction restraining the personal defendant, his servants and deputies, from “interfering with, obstructing or prohibiting plaintiff from erecting its posts, making the necessary connections with its supply wires or furnishing electric lights to the citizens and inhabitants of the city and county of San Francisco; and specially from hindering and preventing this plaintiff from making connections with its electric wires as aforesaid on said Market street, in said city and county of San Francisco, in the block bounded by Geary and Kearny streets, Grant avenue, and Market street.

The verified complaint sets forth the incorporation of plaintiff for the purpose of furnishing electric light to the inhabitants of San Francisco; that the owners of the premises fronting the portion of Market street described applied to plaintiff for electric light in the building and for lights in front of the building, as they had theretofore been supplied by the Electric Light and Power Company. That plaintiff proceeded to erect posts just as they had been theretofore maintained by the rival company, with the consent of the city, but was stopped by the defendants and its servants threatened with arrest if they proceeded to erect the poles.

Many other matters are alleged tending to show that the defendants are favoring the rival company, and obstructing the plaintiff in the interest of its rival, and it is averred that the opposition of plaintiff has reduced the charge for electric lighting twenty-five per cent.

In response an affidavit of a deputy street superintendent is filed, the point of which is to deny that any interference has been made with plaintiff in its efforts to make connection with its wires for the purpose of furnishing light to the owners of the building. Also that the plaintiff was attempting to obstruct the streets by erecting poles therein, and an ordinance is shown which prohibits any person from erecting poles in the street without special permission so to do.

Reply affidavits, made by P. B. Cornwall and W. R. Summerhayes, were filed, in which the charges made in the complaint are repeated with some more specific statements of facts, and they charge that the action of the superintendent of streets and the

board of supervisors preventing the plaintiff from carrying on its legitimate business "was and is inspired and controlled and directed by the corporation known as the Electric Light and Power Company, and was and is done for the purpose of driving the plaintiff out of the market as a competitor in electric lighting in the city and county of San Francisco."

Some facts are shown in proof of this charge. Among others, that application was made to the board of supervisors for leave to put posts in front of the Baldwin Hotel, on Powell street, at the request of the owner. The application was denied, although subsequently the board granted leave to its rival "to put in similar electric posts, placed in exactly the same position, with exactly the same electric lamps thereon, in several points in the city of San Francisco." The affidavits further say that they complained to Ashworth; that Ashworth said "that the board of supervisors was pushing him, and that the Edison Light and Power Company stood behind the board of supervisors, objecting to any equal or other privileges being extended to the plaintiff."

Similar facts are stated in an affidavit of Robert Mills, an employee of plaintiff. He also states that in the interest of the plaintiff he called upon three members of the board of supervisors, and that they told him that "the Edison people had brought such pressure to bear, by claiming that the plaintiff had no right to put up poles there, that they [the board of supervisors] could do nothing." Mr. Hughes also told affiant that after Mr. Summerhayes had made application on behalf of the plaintiff for a permit, "that the Edison Light and Power Company people had brought influence to bear, causing the street committee to rescind the privilege." He also states that Mr. Hughes said that plaintiff had no right to maintain posts; that "the Edison Light and Power Company have bought a franchise, and therefore we must protect the Edison people." There is no real pretense that the Edison Company ever had any such franchise, and it is not claimed that the board of supervisors can lawfully grant them any special privileges. Counsel for the defense do not even contend that such preference is not unlawful, and a violation of official duty.

It is stated that the plaintiff had not obtained a permit to put up posts on the sidewalk, and without such permit such obstructions are unlawful and therefore a nuisance. This is undoubted-

ly true, and the board of supervisors, if so inclined, as according to the affidavits, which are not denied, it is, can allow one company the privilege while denying it to the other, and thus, in affect, nullify the constitutional provisions which expressly permit the plaintiff to lay its pipes in the street, and commands, that no privileges or immunities shall be granted to any citizen or class of citizens which upon the same terms shall not be granted to all citizens. (Const., art. XI, sec. 19, also art. I, sec. 21.)

It was also shown that Thomas Ashworth, street superintendent, was a stockholder in the Edison Light and Power Company, and further that the attorneys for that corporation are the attorneys who appear in this action and make the defense of the defendants herein.

In fact the uncontradicted affidavits show plainly that it is a deliberate attempt to drive one corporation out of the field, in the interest of another, by the oppressive and unlawful use of official power. Counsel do not attempt to justify the action of the board of supervisors, but simply insist that without the official permit the plaintiff has no right to set posts on the sidewalk, and that its servants may be properly arrested for so doing. In the mean time, however, the privileges are freely granted to the rival company, whose posts may be seen on any block in the business portion of the city. Counsel say: "Thus it is asserted that the superintendent of streets is a stockholder in a rival corporation, but, if he has acted and does act in accordance with his duty, the bad motive which induces correct action cannot be considered. No man can be enjoined from doing his duty, because third persons have paid him for doing that which without pay he should have done."

It is the granting or refusing to grant the permit which determines whether the post constitutes a nuisance or not. The partisans of the Edison Light and Power Company in the board of supervisors can refuse the permit to one and grant it to the other. Therefore, a post when erected by one is a nuisance, when it would not be if erected by another. An ordinance which would so discriminate would be void, and the plaintiff contends that the board cannot do in other modes what it cannot do by ordinance. That discrimination is unlawful, and therefore the

board and the superintendent act illegally when they order the arrest of plaintiff's employees for doing that which is freely permitted to the rival and favored company.

If it were ever proper to interfere with the discretion vested in the officers of the city in the constant supervision and control of the streets in this mode, it may be admitted that a stronger case is not likely to arise. But the ordinance which requires a special permission to be obtained before the streets can be obstructed is a reasonable one. Indeed, some control over this matter is absolutely necessary. Some temporary obstructions must be permitted. This does not prove that any one can obstruct the streets at his pleasure. In the use of this discretion, which must exist somewhere, great injustice may be done by officials who are corrupt or partial, and I have no doubt that a remedy may be obtained in the courts. It cannot be, however, by a violation of a valid ordinance. The remedy would seem to be in compelling the granting of a permit in a proper case. It cannot be denied that such an obstruction, without the permit, is unlawful, and therefore a nuisance. The wrong consists in refusing it to the plaintiff when it ought to be granted, and under such circumstances as it is freely granted to the favored corporation.

The order is affirmed.

Henshaw, J., and McFarland, J., concurred.

[L. A. No. 230. Department Two.—September 3, 1897.]

ROSA HASS et al., Appellants, v. MUTUAL RELIEF ASSOCIATION OF PETALUMA, Respondent.

MUTUAL BENEFIT ASSOCIATION—PAYMENT FROM RESERVE FUND—CHANGE OF BY-LAWS—PROVISION FOR CHANGE—HARMLESS AMENDMENT.—A member of a mutual benefit association cannot complain of an amendment to the by-laws providing that a payment of two thousand dollars should be made out of the reserve fund only when there is a sufficient excess over fifty thousand dollars, where the amendment was made in pursuance of a by-law which permitted it, and which was in force when the membership of such member commenced, and especially where at that time there was a rule which fixed the excess at two hundred thousand dollars, thus making the amendment to the benefit and not to the detriment of such member.

ID.—BY-LAWS PART OF CONTRACT.—All of the by-laws, rules, and regulations of a mutual benefit association become part of its contract with its members, whether referred to in the contract or not, and all of them must be read together.

ID.—FINDINGS AGAINST EVIDENCE—INTENTIONAL DEPLETION OF RESERVE FUND—AMOUNT OF FUND—ORDER GRANTING NEW TRIAL—PRESUMPTION UPON APPEAL.—Where a finding that the reserve fund was purposely depleted in order to evade payment of dues to beneficiaries is without evidence or allegation to support it, and a finding that there was more than fifty thousand dollars in such fund was unsustained by the evidence, and the court granted a new trial upon motion of the defendant, after having rendered judgment in favor of the plaintiff in too large an amount, based upon the findings, the presumption upon appeal from such order is against the findings, and not in their favor, and the order will be affirmed.

ID.—NATURE OF RESERVE FUND—ABSENCE OF RULE CREATING IT.—Where there is no by-law or rule creating a reserve fund, or defining of what it shall consist, and certain moneys are specially devoted to other purposes, the net assets are to be treated as belonging to that fund which are not specially devoted to other purposes.

ID.—BURDEN OF PROOF AS TO EXCESS—DEDUCTIONS FROM ASSETS—OVERDRAFTS Where a by-law provides that a certain payment is to be made out of the reserve fund only where there is an excess over fifty thousand dollars, the burden of proof is upon the plaintiff claiming such payment, to prove that there was such excess in the reserve fund, after deducting from the assets funds devoted to special purposes, and also deducting the amount of an overdraft from bills receivable.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. Walter Van Dyke, Judge.

The facts are stated in the opinion of the court.

J. F. Conroy, for Appellant.

Lippitt & Lippitt, for Respondent.

TEMPLE, J.—The complaint in this case *inter alia* shows that the defendant is an incorporation, the purpose of which is to secure certain money benefits to the friends of deceased members. By-laws are set out which promise to the nominee of a member dying in good standing "one dollar in coin for every member of this association in good standing at the time of said death." Also a by-law which provides that the nominee of a deceased member who had been such member for ten years, "shall receive two thousand dollars, though the association may not have that number of members at the time of his death."

It is averred that one Lena Brenner became a member of the defendant, and having made the plaintiff her nominee, died on the fifth day of June, 1894; that she was a member in good standing at the time of her death, and had been such member for more than ten years immediately prior to her death. Due presentation of her claim to defendant and its rejection are averred.

The answer admits the facts set up, except that in effect it shows that only a portion of the contract is set out in the complaint, and proceeds to show the other portions of the contract, which provide that the balance of the two thousand dollars over and above the number of members is payable only out of the reserve fund of the association when there is a surplus in such fund over fifty thousand dollars sufficient to meet such further payment. It is averred that there was not at the time of Lena Brenner's death, and has not since been, a surplus fund equal to fifty thousand dollars or exceeding thirty-five thousand dollars.

It also avers that the membership of the association at the time of Lena Brenner's death was only eight hundred, and it denies that there was due to plaintiff, as the nominee of Lena Brenner, any sum in excess of eight hundred dollars, which sum had been allowed, tendered and refused.

At the trial the plaintiff submitted her case upon the pleadings, and the defendant then proved the existence of the by-law set up in the answer and put in evidence, which tended to show that at the time of Lena Brenner's death there was not, nor has there been since, fifty thousand dollars in the reserve fund, or even of assets belonging to the defendant. After some evidence in rebuttal the court found that all the allegations in the complaint are true, but further found the contract as alleged in the answer. It also found that paragraph three of section six was not in force when Lena Brenner became a member, and that the reserve fund at the time of Lena Brenner's death amounted to \$54,222.90. The court further found that prior to 1893 the defendant had paid dividends to certain of its members to the amount of \$84,458, and also in 1893 the sum of \$2,489; that all such payments were made out of the reserve fund with intent to reduce the fund to less than fifty thousand dollars, and thereby evade payment of the indebtedness of two thousand dollars. Judgment was rendered for the plaintiff for the sum of \$2,105.40 and costs of suit.

Upon motion of defendant the court afterward granted a new trial, and from that order this appeal is taken.

There is no merit in the appeal. The first contention is that the contract between Lena Brenner and the association was an absolute contract for the payment of two thousand dollars. The section providing that the balance of the two thousand dollars shall be paid out of the reserve fund only when there is a sufficient excess over fifty thousand dollars was not a by-law when Lena Brenner joined. I do not see that it would matter whether it was or not, since the amendment was made in pursuance of a by-law which permitted it and which was in existence when Lena Brenner became a member, but at that time there was a rule which provided that the payments should be made only when there would be left in the fund two hundred thousand dollars. The change was not detrimental to the appellant.

Counsel also say that the answer admits that two by-laws providing for the payments are correctly set out in the complaint, whereas they are not as set out; the answer omits the words "as hereafter provided," which are in the by-laws, and which may be held to refer to subsequent provisions which limit the rights of nominees of deceased members. No doubt counsel make this point with extreme reluctance and will be pleased to find that it does not affect the rights of the parties. All the by-laws, rules, and regulations become part of the contract whether referred to or not. There was no other contract entered into. All these must be read together.

The finding above alluded to holding that the reserve fund had been purposely depleted in order to evade payment of dues finds no excuse either in allegation or proof. It is not supported by a scintilla of evidence. The interest on money was applied to the annual dues of members of long standing in pursuance of a by-law which was a part of the original scheme. Lena Brenner must have participated in these dividends. They may have kept the fund below fifty thousand dollars, but her beneficiary cannot complain, for it was a part of her contract that it might be done. Many such societies promise more than they can perform, and, somehow, promises to do the impossible always attract.

If the court was right in finding as to the amount in the reserve fund, this finding could not have been deemed important,

and even if the finding were sustained by evidence it would not be the equivalent of the finding of such a fund, and in this case was relevant to no possible issue.

The finding that there was more than fifty thousand dollars in the reserve fund was also unsustained by the evidence. In considering these questions it must be remembered that the court granted a new trial. The presumption is therefore against the findings and not in their favor.

The by-laws speak of a reserve fund, and, as we have seen, provide for payments out of the excess of that fund over fifty thousand dollars. There is, however, no by-law or rule creating a reserve fund or defining of what it shall consist. Certain moneys are specially devoted to other purposes. Under such circumstances I think we may treat all the net assets as belonging to that fund which are not specially devoted to other purposes. The assets of defendant for 1894, during which year Lena Brenner died, were not shown. But the assets for 1893 were shown. Waiving the point that this does not meet the necessities of the case, and that the burden of proving that there was an excess in the reserve fund was on plaintiff, we find that the assets of 1893 amounted to \$52,312.32. In this list of assets was included \$1,483.10 due for interest, which, under the by-laws, is devoted to dividends, and \$1,386.22 due for assessments which belong to the nominees of deceased members, and there is an overdraft of \$10,439.77 which must be deducted from bills receivable. Certainly the court properly granted a new trial.

Order affirmed.

Henshaw, J., and McFarland, J., concurred.

[S. F. No. 536. Department Two.—September 4, 1897.]

GEORGE F. GRAY, Respondent, v. ASA R. WELLS, Appellant.

CONTRACT FOR CEMENT BULKHEAD—GUARANTY OF CONTRACTORS—NEGLIGENCE OF OWNER—PREMATURE FILLING OF BANK UPON UNHARDENED WALL—RECOVERY OF CONTRACT PRICE.—Under a contract to construct a cement bulkhead, a guaranty of the work for five years against all defects arising through fault of workmanship or material, and that the wall would hold the bank unless undermined on the north side, is to be construed together, as not requiring the wall to hold the bank at all events, but only that it shall not fail to hold it by reason of defects of workmanship or material; and where the bulkhead was properly constructed according to contract, and the wall was strong enough to hold the bank, if it had been allowed to set and harden, as proposed by the contractors, but, through the negligent action of the owner, in prematurely filling in the bank, against the objection and protest of the contractors, while the wall was very green, the wall was caused to topple over, bulge out, and crack, the contractors are not liable upon their guaranty for failure of the wall to hold the bank, and may recover the contract price, and the owner cannot recoup any damages therefrom.

ID.—FINDINGS—IMMATERIAL OMISSIONS.—Where the court found that the work was done in a good, skillful, and workmanlike manner, and with sufficient and proper materials, and in all respects as required by the contract, the omission to find upon issues raised by the answer as to whether the wall was or was not undermined on the north side, and whether it became cracked in several places, sprung out of line, bulged out, and overhung the adjoining lot, so that it became and was utterly worthless, is rendered immaterial, and cannot be prejudicial error, or ground for reversal.

ID.—INTERFERENCE WITH WALL IN PROCESS OF CONSTRUCTION—SUPPORT OF FINDING.—Where the court found that all defects in the wall were caused by the conduct and interference of the defendant "while the said wall was in process of construction," the finding is supported by evidence that defendant interfered by filling in the bank while the wall was green; and the wall cannot be said to have been fully constructed until the cement had had time to set and become hardened, so that any act during that time which caused injury to it may be properly treated as an act done during the process of construction.

ID.—HYPOTHETICAL FINDING AS TO DEFECTS—SURPLUSAGE—CONSISTENCY OF FINDINGS.—A finding that the defects in the wall, "if any there were," was occasioned by the conduct and interference of defendant himself while said wall was in process of construction, construed in connection with other findings that the contractors fully performed the contract in a good, skillful, and workmanlike manner, and furnished the materials in all respects in accordance with the con-

tract, and that defendant was not damaged by any act or omission of theirs, but that any damage he may have sustained was occasioned by reason of defendant's own conduct in interfering with the construction of the wall and changing the same from the plans upon which they agreed, desired, and sought to perform the work, is to be construed as stating that whatever defects there were on the wall was caused by the defendant, and the words, "if any there were," may be disregarded as surplusage; nor is there any inconsistency in the findings.

ID.—CONTRACT PRICE—PROVISION FOR EXTRA WORK AT A SPECIFIED RATE—FINDINGS.—Where the contract provided a fixed price of two hundred and fifty dollars for a concrete bulkhead, of specified dimensions, but also expressly provided that any extra concrete work in the wall was to be charged for at the rate of twenty-four cents per cubic foot, whatever extra work was performed by the contractors was part of the work done under the contract, and the agreed price therefor constitutes a part of the indebtedness which may be recovered under the contract, and where the court found that the contract had been performed in all respects according to its terms, and that under it defendant became indebted to the contractors in the sum of three hundred and twenty-five dollars, the finding is sufficient, without segregating the items for contract price and extra work, and finding specifically as to each; and where the evidence is conflicting as to whether extra work of the value of seventy-five dollars was performed, the findings and judgment will not be disturbed for insufficiency of the evidence as to the fact or value of extra work.

PARTNERSHIP—CERTIFICATE—ACTION BY ASSIGNEE—ASSIGNMENT TO MEMBER OF FIRM.—Though persons doing business as partners under a fictitious name cannot maintain any action upon or on account of any contracts made or transactions had in their partnership name, until they have first filed and published the certificate of partnership, as required by sections 2466 and 2468 of the Civil Code, yet their assignor may maintain such action, though there be no certificate of partnership filed and published; and the fact that the assignee was a member of the firm is immaterial.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion.

Boyd & Fifield, for Appellant.

Fisher Ames, for Respondent.

BELCHER, C.—The plaintiff, as assignee of G. F. Gray and H. N. Gray, partners doing business in the city and county of

San Francisco under the firm name of Gray Bros., brought this action to recover the sum of three hundred and sixty-four dollars and ninety-six cents alleged to be due and unpaid for work and labor performed and incidental materials furnished by said Gray Bros. to defendant at his special instance and request.

The answer denied the alleged indebtedness, and as a separate defense alleged "that on or about the 6th of April, 1894, the firm of Gray Bros., mentioned in the amended complaint herein, entered into a contract with this defendant, by the terms of which the said firm agreed to construct a concrete bulkhead, sixty-eight feet nine inches long, ten feet high, and averaging eighteen inches in thickness, in the rear of defendant's property, No. 2118 Pacific avenue, in said city and county of San Francisco, for the total sum of two hundred and fifty dollars, and to use blue-trap rock and Gillingham cement in the construction of said work, and guarantee it for five years against all defects that may arise through fault of workmanship or material used, and guarantee the wall to hold the bank unless undermined on the north side, and for any extra concrete work in the wall to charge for at the rate of twenty-four cents per cubic foot."

The answer further alleged that the labor and work to be done, and materials to be furnished, under this contract, were the same as those mentioned in the complaint; that Gray Bros. never performed the conditions of the said contract, but, on the contrary, so negligently and unskillfully, as to workmanship, constructed said bulkhead and wall that the same was insufficient to hold, and did not hold, the bank, although the wall was never undermined on the north side, but the wall cracked in several places, and sprung out of line, and bulged out and overhung the lot of the adjoining owner and so became valueless. The answer then set up a counterclaim for damages in the sum of two hundred and sixty dollars, growing out of the said defects. And it further pleaded in abatement of the action that Gray Bros. had never filed or published any certificate of partnership, as required by the Civil Code.

The case was tried by the court without a jury, and judgment was entered in favor of the plaintiff for the sum of three hundred and twenty-five dollars, with interest and costs. From that judgment and an order denying his motion for a new trial the defendant has appealed.

It is claimed for appellant that the findings are inconsistent with each other, inferential, uncertain, and hypothetical, and that they do not sustain the judgment.

The findings principally complained of are as follows:

"5. That the said Gray Bros. performed all of said work under contract between them and said defendant, as set up in defendant's answer, and that they performed the said work and furnished materials therefor in all respects in accordance with the requirements and conditions of said contract in a good, skillful and workmanlike manner, and that the same was not constructed negligently or unskillfully as to workmanship, not of insufficient or poor or improper materials, but in all respects of materials as required by the express provisions of said contract.

"6. That any and all defects in the construction of the wall, if any there were, were occasioned by the conduct and interference of defendant himself while said wall was in process of construction.

"7. That said defendant has not been damaged by any act or omission upon the part of said Gray Bros. in the sum of two hundred and sixty (\$260) dollars, or in any other sum whatever, and any damage that he may have sustained has been occasioned and sustained wholly by reason of defendant's own conduct in interfering with the construction of said wall, and changing the same from the plans upon which said Gray Bros. agreed, desired, and sought to perform said work."

1. It is claimed that, assuming finding 5 states the facts correctly, so far as it goes, still there is no finding that the wall was undermined on the north side, or that it did not become cracked in several places, spring out of line, bulge out and overhang the adjoining lot, so that it became and was utterly worthless, as alleged in the answer, and that, in view of the contractor's guaranty that the wall would hold the bank for five years unless undermined on the north side, such findings were necessary in order to entitle plaintiff to recover. But the guaranty was for five years against all defects that might arise through fault of workmanship or materials used, and that the wall would hold the bank, etc. This guaranty must all be read and construed together, and it could not have been intended to

have effect under any and all circumstances, but only in case the wall should fail to hold the bank by reason of defects arising from fault of workmanship or materials used in its construction. And as the court found that the work was done in a good, skillful, and workmanlike manner, and with sufficient and proper materials, and in all respects as required by the contract, it was immaterial whether the wall was undermined on the north side, or whether it cracked and bulged out, thereby becoming worthless, or not. If, therefore, it was error not to find specifically as to those facts, it was a harmless error, and appellant was not prejudiced thereby, and hence is not ground for reversal.

2. Again, it is claimed that, as finding 5 states in effect that Gray Bros. constructed the wall as called for by the contract, it must follow that if the wall did not stand it was by reason of the fact that they misconceived the power of such a wall, and they are therefore liable upon their guaranty, and respondent cannot recover.

It was proved that when the wall was constructed the contractors did not want any earth piled against it until it had had time to dry out; that two days after the wall was finished, and while it was very green, the contractors discovered that appellant was causing dirt to be shoveled in against it on the south side, and objected to his doing so; that they told him the wall was very green, and would not hold if he continued to pile the dirt in, but he refused to stop doing so and said he would take the chances; that before the wall had dried out appellant caused dirt to be piled against it to the extent of four or five feet above it on the south side; that this filling of earth was the cause of its toppling over, and that it would have been secure if it had been allowed to set, and the dirt had not been filled in against it. And finding 6 is to the effect that all defects in the wall were caused by the conduct and interference of appellant himself while the said wall was in process of construction.

Counsel say, however, that this finding refers only to a time when the wall was in process of construction, and not to a time after its construction; that there is no finding that any act of defendant subsequent to the completion of the wall caused any injury to it; and hence it is argued that the evidence cited cannot be treated as sufficient to justify the finding or support

the judgment. But, under these circumstances, the wall cannot be said to have been fully constructed until the cement had had time to set and become hardened, and any act during that time which caused injury to it may properly be treated as an act done during the process of construction.

3. Appellant complains that there was no finding as to whether there were or were not any defects in the construction of the wall, and claims that finding 6 is uncertain and hypothetical because it says the defects, "if any there were," were occasioned by the conduct and interference of defendant. But the finding that the work was done and the materials furnished in all respects in accordance with the contract, and in a skillful and workmanlike manner, very clearly imports that there were no defects caused by the contractors in the construction of the wall. And finding 6 clearly states that whatever defects there were in the wall were caused by defendant. The words, "if any there were," were therefore mere surplusage and may be disregarded.

4. Counsel say: "But if finding 5 is true, it conclusively shows that defendant did not succeed in causing any deviation from the contract, either in workmanship or materials, and hence his conduct was innocuous. Moreover, if finding 6 is to be construed as a finding that he did so succeed, it becomes inconsistent with finding 5."

We see no necessary inconsistency in these findings, and the same may be said of findings 5 and 7. The contract was to construct a concrete bulkhead sixty-eight feet nine inches long, ten feet high, and averaging eighteen inches in thickness. No plans were referred to in the contract or attached to it. A little sketch or plan was prepared as to the way the wall was to be built, but it was proved that when the work was going on appellant caused the contractors to deviate from this plan somewhat, against their protest that it would make a weaker wall. It was also proved that the wall as built was strong enough to have held but for the acts of appellant in piling up dirt against it before it had become hardened and set.

5. Appellant insists that if finding 5 is true, then plaintiff was only entitled to a judgment for two hundred and fifty dollars, which was the total contract price, and that the finding is

inconsistent with finding 1, which fixes the amount plaintiff was entitled to recover at three hundred and twenty-five dollars.

The complaint alleged an indebtedness of three hundred and sixty-four dollars and ninety-six cents for work and labor done and materials furnished. The answer set up a contract, under which the work was done and the materials furnished. The contract fixed the contract price at two hundred and fifty dollars, but it also provided that for any extra work in the wall the contractors should charge twenty-four cents per cubic foot. Whatever extra work was performed by the contractors was therefore a part of the work done under the contract, and the agreed price therefor constituted a part of the indebtedness for which plaintiff was entitled to recover. The court found that the contract had been performed in all respects according to its terms, and that under it defendant became indebted to the contractors in the sum of three hundred and twenty-five dollars. This sum must, of course, have been made up of the two hundred and fifty dollars for the main bulkhead and seventy-five dollars for extra work, but it was not necessary for the court in its findings to sever the items and find specifically as to each.

We conclude that under the pleadings plaintiff was entitled to introduce proof as to any extra work done, and we see no material conflict or inconsistency between any of the findings.

6. It is further claimed by appellant that the evidence was insufficient to show that extra work of the value of seventy-five dollars, or of any value, was done by the contractors, and hence that the plaintiff at most was entitled to recover only two hundred and fifty dollars. But whether extra work was done, and what was its value, were questions upon which the evidence was clearly conflicting. The judgment cannot, therefore, be disturbed on this ground.

7. Finally it is claimed that the plaintiff could not maintain the action, because he was a member of the firm of Gray Bros., and that firm had never filed or published any certificate of partnership as required by the Civil Code. (Civ. Code, secs. 2466, 2468.) But it has been held by this court that, though persons doing business as partners cannot maintain any action upon or on account of any contracts made or transactions had in their partnership name until they have first filed and published the certifi-

cate required, still their assignee may maintain such an action. (*Cheney v. Newberry*, 67 Cal. 126; *Wing Ho v. Baldwin*, 70 Cal. 194.) And the fact the assignee was a member of the firm is immaterial. It was in effect so held in the case first cited, where the name of the firm was Wm. H. Cheney & Co. and the name of the assignee William H. Cheney. This point cannot therefore be sustained.

We find in the record no valid ground for reversal, and advise that the judgment and order appealed from be affirmed.

Searls, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 418. Department Two.—September 4, 1897.]

WALTER A. PARKHURST, Respondent, v. MARTHA E. PARKHURST, Appellant.

DIVORCE—MAINTENANCE OF CHILDREN BY MOTHER—DIVISION OF PROPERTY—STIPULATED DECREE—REFUSAL TO MODIFY.—Where, by stipulation of the parties to an action for divorce, the community property was divided so as to yield property to the wife, free of encumbrance, of the value of ten thousand dollars, she having also other property of her own valued at three thousand one hundred dollars, while the husband retained only about sufficient property to pay his debts, and, by their agreement, the decree awarded the custody of the minor children to the mother, to be maintained and educated at her sole cost, and that she should have no other alimony or allowance from the father, the stipulated disposition of the property was an equitable settlement, as between the parties, of the burden of caring for and maintaining the offspring; and where it appears that the children are properly supported, maintained, and educated by the mother, and that she has nine thousand dollars in value left of the property awarded to her, her application to modify the decree so as to cast the burden of maintaining the children upon the father is without merit, and is properly refused.

ID.—APPLICATION TO MODIFY DECREE—EVIDENCE—STIPULATION FOR SUPPORT OF CHILDREN.—Although the stipulation of the parties to an action for divorce cannot divest the parents, as against the children, of the duty of maintaining them, and is not admissible to vary or modify

a decree of divorce, or to change the rights of the parties as determined thereby, yet where the stipulation supports and upholds the decree, and is tantamount to an agreed statement of facts, upon which that portion of the decree relating to property rights and the custody, maintenance, and education of the children was based, the stipulation is admissible in evidence against the mother, upon her application to modify the decree, so as to require the father to maintain the children contrary to the stipulation.

Id.—COUNSEL FEE.—Where an application of the divorced mother to modify the decree is without merit, her application for a counsel fee is properly denied.

APPEAL from an order of the Superior Court of Santa Clara County refusing to modify a decree of divorce. W. G. Lorigan, Judge.

The facts are stated in the opinion.

W. C. Kennedy, for Appellant.

The decree of divorce does not sever the relation of parent and child, or the responsibility of the father for the maintenance of his children, and the decree may be modified to require such maintenance. (2 Bishop on Marriage and Divorce, secs. 1212, 1213; *Plaster v. Plaster*, 47 Ill. 290; *Wilson v. Wilson*, 45 Cal. 399; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Pretzinger v. Pretzinger*, 45 Ohio St. 452; 4 Am. St. Rep. 542; *Washburn v. Catlin*, 97 N. Y. 623; *Howell v. Howell*, 104 Cal. 45; 43 Am. St. Rep. 70; *Cowls v. Cowls*, 8 Ill. 435; 44 Am. Dec. 708.) The children of the divorced parties are the wards of the court, and its jurisdiction over them is continuing. (*Hoffman v. Hoffman*, 15 Ohio St. 427, 435; *Miner v. Miner*, 11 Ill. 43; *Cornelius v. Cornelius*, 31 Ala. 479; *McGill v. McGill*, 19 Fla. 341; *Hill v. Hill*, 49 Md. 450; 33 Am. Rep. 271; *Rogers v. Rogers*, 51 Ohio St. 1; *Ex parte Gordan*, 95 Cal. 374, 377.) The wife could not stipulate away the rights of the children. (*Pierce v. Pierce*, 64 Wis. 72; 54 Am. Rep. 581.)

Jackson Hatch, for Respondent.

Aside from the stipulation and decree, it is as much the duty of the mother as of the father to support the children. (*Cushman v. Hassler*, 82 Iowa, 295; *White v. White*, 75 Iowa, 218; *Fulton v. Fulton*, 52 Ohio St. 229; 49 Am. St. Rep. 720; *Pawling*

o. Wilson, 13 Johns. 192; *Finch v. Finch*, 22 Conn. 411; 2 Bishop on Marriage and Divorce, 4th ed., sec. 557.)

SEARLS, C.—This is an appeal by the defendant from an order of the superior court in and for the county of Santa Clara, refusing to modify a decree of divorce, and to allow defendant one hundred dollars per month for the care, custody, and maintenance of Herbert N. and Minnie A. Parkhurst, aged seventeen and fifteen years respectively, the children of the parties hereto.

The cause was heard in the court below upon the affidavits of the parties and of sundry other persons, and upon oral testimony taken in open court.

Written findings were filed, from which it appears, among other things, that by a decree of the superior court entered February 29, 1892, the marriage which had theretofore existed between plaintiff and defendant herein was dissolved; their property divided; the defendant herein receiving real property of the value of \$10,000, and plaintiff received the residue of the community property, which is of the value of \$11,681.

Plaintiff was indebted at the date of the decree in the sum of \$11,800, which he has since reduced to \$5,358.

Defendant also possessed at that date certain other money or money invested of the value of say \$3,100 (presumably her separate property), of which she still has \$1,600 invested with a son in Oregon.

The decree awarded the two infant children to the custody of defendant, and provided that she be charged with their maintenance and education at her own cost and free from any charges against the plaintiff therefor; that she should not have any alimony or allowance from the plaintiff, and that she should not remove the children from the state of California, except by leave of the court.

This decree, so far as the disposition of the property, custody of the children, waiver of alimony, costs, etc., was entered pursuant to a stipulation, entered into and signed by the parties, husband and wife. The admission of this stipulation in evidence was objected to by defendant, and the ruling against her is assigned as error.

Plaintiff married again after his divorce from defendant; had

an income from his business as a real estate and insurance agent of over three thousand dollars per annum until his health failed, and he was compelled to give up in part his business, and it is not probable he will in the future be able to do more than meet expenses and indebtedness.

Soon after the divorce defendant removed the children to Oregon, where she has cared for and educated them in a manner suited to their condition in life, and the court finds that "no present necessity exists for any better support or any higher education than they have received and are receiving from the defendant."

At the present time defendant's real property is encumbered to the extent of one thousand dollars, and yields a revenue of fifteen dollars per month, and she still retains a claim for sixteen hundred dollars for money loaned against her son, a business man, in Portland, Oregon.

The foregoing constitutes an epitome of the findings upon which the court drew the conclusion of law that defendant was not entitled to the relief sought in her application.

We need not stop to discuss the duty of parents to support and educate their minor children during the existence of the marital relation, or to those cases where, after the severance of that relation by a decree of divorce which consigns the custody of the infant children to the mother and is silent as to their maintenance.

Our Civil Code, section 138, provides that: "In an action for divorce the court may, before or after judgment, give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same."

In the present instance the court by its decree relegated the custody, maintenance, and control of the minor children of the marriage to the mother, the defendant herein, and provided that she should be charged with the education and maintenance of them at her own proper cost and free from any charges therefor against the plaintiff.

In view of the disposition of the community property, this was no doubt a proper and equitable settlement as between the parties of the burden of caring for and maintaining the off-

spring. So far as we can see from the record, the plaintiff only received about sufficient of the property to pay his debts, while the defendant acquired property of the value of ten thousand dollars, free from all charge or encumbrance. She has nine thousand dollars in value of this property left. The decree embodied the exact terms of the agreement or stipulation of the parties, and no reason is perceived why, as between themselves, defendant, who has reaped all the advantages of her contract, and which she does not aver was unjust in any of its parts, should not exercise the common honesty of carrying out its terms.

The authority of the court to modify the decree in a proper case, and to provide when necessary that the plaintiff shall discharge his paramount duty in caring for and defraying the expense of educating his children, is not doubted. The stipulation of the parents cannot divest them, as against the children, of this duty. (*Wilson v. Wilson*, 45 Cal. 399.)

This application is by the defendant, and, had it been granted, would have inured to her benefit by casting the burden of maintaining and educating the children upon the plaintiff, and thereby preserving to her the property, which we must suppose was awarded to her at least in part for this very purpose. But it is contended by appellant that the stipulation in question was not admissible in evidence, that its admission was error. A previous understanding or agreement is not admissible to vary or modify a decree of divorce or to change the rights of the parties as determined thereby. (*Wilson v. Wilson*, *supra*.)

But the stipulation here does not modify or change the judgment or the rights of the parties. On the contrary, it supports and upholds such judgment. It was tantamount to an agreed statement of facts upon which that portion of the decree relating to property rights, custody of the children, etc., was based, and hence was admissible in evidence.

There is no specification of the particulars wherein the evidence was insufficient to justify the findings, and, had there been, we think the findings have ample support in the testimony. These findings show that the minor children are properly supported, maintained, and educated.

As the application was without merit, the application for a counsel fee was properly denied.

We recommend that the order appealed from be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Crim. No. 250. Department Two.—September 4, 1897.]

THE PEOPLE, Respondent, v. H. G. AMMERMAN,
Appellant.

CRIMINAL LAW—ROBBERY—PLEAS—FORMER ACQUITTAL—JEOPARDY—PRIOR DEFECTIVE INFORMATION—OWNERSHIP OF PROPERTY—DISMISSAL—INSTRUCTION
Where an information charging defendant with the crime of robbery omitted to state the ownership of the property taken from the person robbed, such omission rendered the information fatally defective and invalid, and where it was dismissed on that ground, upon motion of the district attorney, after the jury was sworn, and before any evidence was offered, there was no jeopardy or acquittal of the defendant; and where a plea of former acquittal and of once in jeopardy was interposed to a new information for the same offense, because of the dismissal of the prior information, the court may properly instruct the jury to find for the people upon such pleas.

ID.—DEFINITION OF ROBBERY—OWNERSHIP OF PROPERTY IN ANOTHER ESSENTIAL—CONSTRUCTION OF STATUTE—LEGISLATIVE INTENT—INFORMATION FOLLOWING WORDS OF STATUTE.—Although the statute defines robbery to be the felonious taking of personal property in the possession of another, and does not expressly provide, as in larceny, that it must be the personal property of another, yet the ownership of the property in some person other than the accused must be regarded as within the legislative intent denouncing the crime of robbery, and is deemed to be as essential in making out the crime as any other element of the offense expressed in the statute; and an information for robbery omitting to aver such ownership cannot be regarded as within the rule that an information is good because substantially following the language of the statute.

ID.—ASSAULT WITH INTENT TO COMMIT ROBBERY—OWNERSHIP OF PROPERTY.
The ownership of the property in another person than the defendant is as requisite to the crime of assault with intent to commit robbery as it is to the crime of robbery.

ID.—FILING NEW INFORMATION WITHOUT ORDER OF COURT—CONSTRUCTION OF PENAL CODE.—It is not mandatory upon the court, under section 1117 of the Penal Code, to direct the district attorney to file a new informa-

tion, where the jury is discharged because the facts as charged do not constitute an offense; and the district attorney may file a new information, in such case, without an order of the court; nor is the prosecution barred, in such case, under section 1008 of the Penal Code, because the court did not direct a new information to be filed, that section being only applicable in the case of a demurrer sustained.

ID.—INSTRUCTIONS TO FIND FOR PEOPLE UPON PLEAS—QUESTION OF LAW—PROVINCE OF JURY.—Where the facts relied upon to support a plea of former acquittal and of once in jeopardy are the dismissal, after the impaneling of the jury, of a fatally defective information, on motion of the district attorney, by reason of its omission to allege the essential fact of ownership of the property, such omission being patent and not disputed, a question of law is raised as to its effect, of which the jury is not competent to judge; and an instruction, in such case, that the jury should find for the people upon the plea does not invade the province of the jury.

ID.—MODIFICATION OF INSTRUCTIONS—REASONABLE DOUBT—ARGUMENT OF COUNSEL.—An instruction upon the subject of reasonable doubt is properly modified by striking out a clause giving to the defendant the benefit of any doubt created by the argument of counsel.

ID.—BURDEN OF PROOF—MISLEADING CLAUSES.—An instruction as to the burden of proof is properly modified by striking out clauses calculated rather to confuse the minds of the jury than to aid them in solution of the evidence.

ID.—BELIEF OF JURORS AS MEN.—It is proper to strike out a clause of an instruction stating that the jurors "may believe as men that certain facts exist," but that, as jurors, they must act only upon evidence introduced.

ID.—ADMISSIONS—STATEMENTS OF DEFENDANT NOT INVOLVING CONFESSION—EXAMINATION BY DISTRICT ATTORNEY—PRELIMINARY PROOF.—Where the defendant made no confession, consisting of a declaration of his agency or participation in the crime charged, or acknowledgment of guilt, but, upon a private examination by the district attorney, after his arrest, and before his preliminary examination, stated that he had a quarrel with the person upon whom the robbery was committed, on the day of its commission, and that he had some money on the following day, which he denied having stolen, but stated that he found it in a sock after leaving that person, such statements of the defendant may be given in evidence without the preliminary proof of their voluntary character required in case of a confession.

ID.—TESTIMONY OF SHORTHAND REPORTER—USE OF NOTES TO REFRESH MEMORY.—A shorthand reporter who took down the statements of the defendant to the district attorney, in shorthand, may be permitted to read his transcription of the statements made, and has a right to refer to the notes to refresh his memory.

APPEAL from a judgment of the Superior Court of Sonoma County, and from an order denying a new trial. **R. F. Crawford**, Judge.

The facts are stated in the opinion.

Barham & Miller, and R. M. Swan, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

CHIPMAN, C.—Defendant was informed against for the crime of robbery by forcibly taking from the person of one Richard Johnson thirty-eight dollars, lawful money of the United States, and was convicted and sentenced to three years' imprisonment. Defendant pleaded former acquittal, once in jeopardy and not guilty.

An information against defendant for the crime of robbery involving the same transaction had previously been filed, and under it defendant was arraigned and pleaded not guilty; a jury was impaneled, the information was read and the plea stated. After the jury was sworn, and before any evidence was offered, upon motion of the district attorney the information was dismissed and the defendant discharged. The ground for the motion was that the information did not allege the ownership of the property stolen, which was in fact true.

1. The first point made by defendant is that the court erred in instructing the jury to find for the people upon the plea of former acquittal and once in jeopardy.

The information was substantially the same as was the indictment in *People v. Vice*, 21 Cal. 344. It was there said: "The indictment in this case is for the offense of robbery, but in the statement of facts constituting the offense there is a fatal defect. The statement contains no allegation as to the ownership of the property of which the party named was robbed, or that it did not belong to the defendant. It is not necessary that the property should belong to the party from whose possession it was forcibly taken. It is requisite, however, that it should belong to some other person than the defendant." The defendant there was tried and convicted, but the judgment was reversed. (Cited in *People v. Shuler*, 28 Cal. 490, and *People v. Anderson*, 80 Cal. 205.)

In *People v. Jones*, 53 Cal. 58, it was held that an indictment for robbery must aver every fact necessary to constitute larceny,

and more. Section 484, Penal Code, defines larceny to be: "The felonious taking the property of another." As an allegation of ownership of the property in another person than defendant is by the statute made essential in larceny, and as to allege the crime of robbery there must be alleged every fact constituting larceny, it follows that the information in the case before us was fatally defective in that particular. (*People v. Crowley*, 100 Cal. 478; *People v. Hicks*, 66 Cal. 103.)

Jeopardy attaches where a party is once placed upon trial before a competent court and jury, upon a valid indictment, to which he cannot be again subjected, unless the jury be discharged from rendering a verdict by a legal necessity or by his consent, or, in case a verdict is rendered, it be set aside at his instance. (*People v. Webb*, 38 Cal. 467, and many subsequent cases.) The information here was not a valid information and there was no jeopardy.

2. Defendant urges that the Penal Code, section 211, defines robbery to be the felonious taking of personal property in the possession of another person, but does not provide, as in larceny, that it must be the personal property of another, and therefore the information was good because substantially in the language of the statute. (Citing Pen. Code, sec. 959, and numerous cases decided by this court.) In one of these (*People v. Girr*, 53 Cal. 629) it was said, as has frequently been elsewhere stated, "that an indictment is sufficient if it describe the offense charged in the language of the statute"; but I do not understand that our court intends to hold that where a fact must be stated in an information in order to charge an offense, it may be omitted from the information where the statute is silent as to that fact. The ownership of the property in some person other than the accused is deemed to be as essential in making out the crime of robbery as any other element of the offense expressed in the statute, and must be regarded as within the legislative intent in denouncing the crime, and therefore it cannot be said that the information here falls within the rule above stated.

3. Defendant further claims that if the first information did not charge robbery it did charge assault with intent to commit robbery, under section 295, Penal Code, and that therefore jeopardy attached. It is sufficient answer to this point that the

omitted element requisite to the crime of robbery is also requisite to the crime of assault to commit robbery.

4. Defendant makes the point that after the jury was discharged, and the first information dismissed and the prisoner discharged, the court did not direct a new information to be filed under section 1117 of the Penal Code, and that the district attorney had no authority to file an information, and the judgment in the case tried is void. (Citing *People v. Schmidt*, 64 Cal. 260.)

Section 1117 provides that: "If the jury is discharged because the facts as charged do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged, . . . unless in its opinion a new indictment or information can be framed, upon which the defendant can be legally convicted, in which case it may direct the district attorney to file a new information," etc. In *People v. Allen*, 61 Cal. 140, it was held that under section 1165 of the Penal Code a new and proper information could be filed without the order of the court. In this latter section it is provided that, "where there has been an acquittal because of a variance between the pleading and proof, which may be obviated by a new indictment or information, the court may order the detention of the defendant, to the end that a new indictment or information may be preferred, in the same manner and with like effect as provided in section 1117." I see no reason why, under this section 1117, the district attorney may not, without the order of the court, file a new information. It is not mandatory upon the court under either section to direct the district attorney in the matter, nor is the power to cause a new information to be filed exclusive in the court.

5. It is claimed that under section 1008 of the Penal Code the prosecution is barred, because the court did not direct a new information to be filed.

In *People v. Jordan*, 63 Cal. 219, it was said by this court: "The legislature seem, in the section referred to, to have made a second prosecution, in case of demurrer sustained, depend upon the judicial opinion of the court that the objection raised by the demurrer may be avoided on a new information; and in the absence of such opinion the prosecution for that offense is at an end."

It is claimed by the attorney general that the statement made by the district attorney when he made his motion to dismiss the information, to the effect that a new information would have to be filed, followed by the order of the court granting the motion, was equivalent to an order by the court to file a new information. I think some more definite direction by the court is contemplated than appears here; but the question does not, in my opinion, necessarily arise, for the reason that no demurrer to the information appears to have been filed. It is by the terms of the statute in the case of demurrer allowed that the judgment becomes a bar unless the court directs a new information to be filed. The section does not apply to a case where no demurrer is interposed, or, if interposed, is disallowed. This clearly appears from preceding and subsequent sections of the same chapter.

Whether defendant is in a position to avail himself of this section, even if it could be invoked, may admit of question, inasmuch as the only pleas made by him were not guilty, former acquittal, and once in jeopardy. (*People v. Whelan*, 117 Cal. 559.)

The point need not be decided, however, as defendant has not shown that section 1008 is applicable to the case.

6. Defendant claims that it was error for the court to instruct the jury to find for the people upon the pleas of jeopardy and former acquittal. The ground of this objection is that the court invaded the prerogative of the jury; that the truth of the plea of former acquittal or jeopardy raises an issue of fact for the jury to determine, and that its judgment cannot be commanded by the court. (Citing Pen. Code, sec. 1118; *People v. Roberts*, 114 Cal. 67, and other cases.) It was held in this case, construing section 1118 of the Penal Code, that the court could not summarily direct the jury to find a verdict of not guilty. It is true, also, as a general proposition, that questions of fact are exclusively with the jury, and that jeopardy is a question of fact; but where, as here, the information failed to charge any offense, it was not error to charge the jury "that the plea of once in jeopardy is not sustained by the evidence, and your verdict on that issue will be 'for the people,'" and so as to the issue of former acquittal. (*People v. Varnum*, 53 Cal. 630; *People v. Helbing*, 61 Cal. 620; *People v. Clark*, 67 Cal. 99.)

The essential fact (the allegation of ownership of the property), the omission of which rendered the first information invalid, raised a question of law as to the effect of which the jury were not competent to judge. The omission was patent and was not disputed, and the only question was whether, upon this state of fact, the defendant had been in jeopardy. I do not think it was an invasion of the province of the jury for the court to instruct as it did. (*State v. Pritchard*, 16 Nev. 101.) I find nothing in the cases cited by defendant inconsistent with the foregoing conclusion. They are *McCullough v. State* (Texas Crim. App. 1896), 34 S. W. Rep. 753; *Holliday v. Jones*, 59 Mo. 482; *People v. Kerm*, 8 Utah, 268.

7. Error is claimed in refusing defendant's instructions Nos. 17, 19, 25, 26, and 27. No grounds of defendant's objections are stated in his brief. I find that Nos. 17 and 19 were in fact given as requested. Instructions Nos. 25, 26, and 27 related to jeopardy, and were properly refused, inasmuch as the court properly instructed the jury to find for the people on this issue.

8. Error is claimed arising from modification of certain of defendant's instructions, to wit, Nos. 4, 5, 8, and 10.

Instruction No. 4 was upon the question of reasonable doubt, which as given clearly stated the law. The court struck out the clause giving the defendant the benefit of any doubt created by argument of counsel. It must be obvious that a court cannot submit a case to the jury upon the relative strength of the argument of the respective counsel. The concluding paragraph of the instruction was stricken out very properly because it added nothing to the value of the rule of reasonable doubt, but, as expressed, rendered the rule itself doubtful of comprehension.

Instruction No. 5 was shorn of its concluding paragraphs, properly I think. The object of the instruction was to state where the burden of proof rested, and was well stated. The paragraphs stricken out were counsel's idea of the meaning of a verdict of not guilty, and were calculated rather to confuse the minds of the jury than aid them in a solution of the evidence.

Instruction No. 8 was cut down somewhat, but I fail to see wherein it fell short, as given, of being a satisfactory statement of what is meant by reasonable doubt, which was the intention of the instruction. Besides, the court gave defendant's instruction No. 6 upon the same subject, which was very full.

From the tenth instruction was stricken out the words quoted as follows: "You may believe as men that certain facts exist," but as jurors you must act only upon evidence introduced, etc. This was not error. It would result in the confusion of the mind of a juror if told that he must not allow his judgment as a man to be mixed up with his judgment as a juror. The duties of a juror in no manner transform him. It is upon the theory that he continues to be a man, though a juror, that he is rendered capable of considering evidence.

9. The remaining error claimed in defendant's brief is that the court allowed the witness, George Hall, to relate a conversation said to have occurred between the defendant and the district attorney in the latter's office shortly after the arrest of defendant and before his examination upon the complaint filed against him in the justice's court. When Hall came in he found the accused, the district attorney, and the arresting officer, Peerman, in the room. He took down the statement in shorthand and afterward transcribed his notes and read this transcription as the statement of the accused. Counsel for defendant denounced this proceeding with great vehemence. The introduction of the statement was objected to as incompetent, irrelevant, and immaterial, and that the proper foundation was not laid for such testimony. Before the witness testified as to any statements made in his presence he was asked: "Q. I will ask you if there was any inducements held out on the part of the district attorney, or any present, any threats or menace used by the district attorney to coerce the defendant into making this statement?" To which he answered: "A. I can only answer by saying, none other than the statement shows." The statement comprises fifty pages of the transcript and consists of a very rigid examination of the accused by the district attorney.

The following questions and answers will show whatever of inducements were held out or threats made to the accused: "Q. You saw Johnson Monday night in a saloon down here, didn't you? A. Yes, sir. Q. You and Johnson had a little trouble, didn't you? A. Not much, a little spat, that's all." This was just before the alleged robbery of Johnson and on the same day. He is then asked about the quarrel, about throwing dice and drinking beer, where he left Johnson that night, what time it was, what

time he went home, and like questions. He is next examined as to his coming to town the following morning. "Q. You had money then? A. Yes, sir. Q. How much? A. I should judge about twenty-eight dollars. Q. That was on Tuesday morning last. You had twenty-eight dollars? A. Yes, sir. Q. Where did you get the money? A. Well, I got it. Q. Where? A. I didn't steal it from this man. Q. Where did you get it? A. Well, I would rather see a lawyer before I say anything further. Q. You don't want to answer that question? A. No, sir. Q. Did you have any money the day before? A. Well, it is immaterial. I don't answer that question either. Q. Did you have it on Sunday, the day before, Sunday, the 14th? A. Well, I aint a-going to answer that question, I would rather not answer any more questions. I would rather see a lawyer. Q. If you can explain where you got that money there may not be any necessity for going on with this case, if you would explain. If you came by it honestly, I should think you would explain it. A. Well, I can explain it, but the devil of it is, I can't prove it. Q. Well, what is your explanation of it. A. Well, I found it. Q. Where? A. When I was going home that night. Q. After you left Johnson? A. Yes, sir. Q. Where did you find it? A. Well, it is between here and Mr. Brown's. It was in an old sock. When I was going up I stepped on it, and I heard something, and I picked it up. I guess the old sock is down there at Brown's yet." He is further questioned as to this find and kind of money, etc.

The accused testified in his own behalf. As to the statement he said: "Well, that statement is not true; I made that under the expectation of getting turned loose. The district attorney told me that if I would explain myself there wouldn't be nothing further said about it, or done about it, and so I tried to explain in a plausible way where I got the money. Of course I didn't think he would use it against me, or anything like that. I thought that he just wanted me to enlighten him, and I thought that probably that was the best way to do it, so I told him that statement. In fact, any way, I did have money in a sock." His story told on the witness stand about meeting Johnson and parting with him and going home Monday night is entirely different from the story narrated in the statement made to the district attorney.

Conceding that defendant's objection to the statement was sufficient to raise the question of its admissibility, we are to consider whether it was error to allow it to go to the jury.

If this statement is to be regarded in the light of a "confession," it is brought dangerously near, if it does not overstep, the border line of involuntary admissions made upon inducement sufficient to render them inadmissible. But was the statement a confession? A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt. (*People v. Strong*, 30 Cal. 151; *People v. Parton*, 49 Cal. 632; *People v. Le Roy*, 65 Cal. 613; 1 Greenleaf on Evidence, sec. 170.) In this statement defendant made no confession; he denied having stolen the money from Johnson, and accounted for its possession by claiming to have found it.

It is true that he admitted the truth of matters which, while they did not in themselves involve his guilt, did, when connected with other facts, tend to prove it. But proof of such admissions is competent, without the preliminary proof. (*People v. Parton*, *supra*; *People v. Le Roy*, *supra*.)

That the witness, Hall, was permitted to read his transcription of the statement, taken down by him in shorthand, was not error. He had a right to refer to this to refresh his memory. (*People v. Cotta*, 49 Cal. 166; *People v. Le Roy*, *supra*.)

It is not urged by counsel that the evidence does not warrant the verdict of guilty, except as to plea of jeopardy. The evidence fully justified the verdict. It is recommended that the judgment of conviction and order denying the motion for a new trial be affirmed.

Belcher, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion the judgment of conviction and order denying the motion for a new trial are affirmed.

McFarland, J., Henshaw, J., Temple, J.

Hearing in Bank denied.

[S. F. No. 570. Department Two.—September 4, 1897.]

RICHARD LAMBERT, Respondent, v. WILLIAM SCHMALZ,
Appellant.

DEBT DISCHARGED IN INSOLVENCY—NEW PROMISE—CONSIDERATION.—When a debt has been discharged by proceedings in insolvency, the remedy to enforce the payment of the debt is gone, but the moral obligation to pay it still remains and is a good consideration for a new promise to make such payment.

ID.—ACTION UPON NEW PROMISE—PROOF REQUIRED.—When an action is brought to recover a debt discharged in insolvency, it must be based upon the new promise, and, to support the action, it must appear that the promise was clear, distinct, unconditional, and unequivocal.

ID.—EVIDENCE OF NEW PROMISE—STATEMENTS PRIOR TO DISCHARGE.—Where there was evidence of repeated promises to pay the debt made after the discharge in insolvency, and a number of payments were made upon it by the defendant thereafter, statements made by the defendant, prior to the discharge, that he would pay plaintiff every dollar of the money, though not constituting such a promise as would remove the bar of the discharge, may properly be considered as supporting the evidence of promises subsequently made.

ID.—NOTE FOR MONEY LOANED—ORAL PROMISE—INTEREST.—Where the debt discharged was a note given for money loaned, bearing interest at the rate of two per cent per month, a clear and unconditional oral promise to pay the debt may be the subject of an action, but, in such case, the indebtedness only bears legal interest from the date of the promise.

ID.—PERCENTAGE.—No percentage can be recovered by the plaintiff in such action.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion.

Jacob Samuels, for Appellant.

A new promise to pay a discharged debt must be express, clear, distinct, unconditional, and unequivocal. (*Meech v. Lamon*, 103 Ind. 513, 515; 53 Am. Rep. 540; *Allen v. Ferguson*, 18 Wall. 1; *Bennett v. Everett*, 3 R. I. 152; 67 Am. Dec. 498; *Apperson v. Stewart*, 27 Ark. 619; *Tolle v. Smith*, 98 Ky. 464; *Elwell v. Cumner*, 136 Mass. 102; *Biglow v. Norris*, 141 Mass.

14; *Dennan v. Gould*, 141 Mass. 16; *La Tourrett v. Price*, 28 Miss. 702; *Stern v. Nussbaum*, 47 How. Pr. 489; *Craig v. Seitz*, 63 Mich. 727; *Brewer v. Boynton*, 71 Mich. 254.) The promises proved were to pay twenty-five dollars per month, and as soon as he was able to pay it all. There is no allegation of either of these promises, nor of ability of the defendant to pay. (*McCormick v. Brown*, 36 Cal. 180; 95 Am. Dec. 170; *Tolle v. Smith*, *supra*; *Richardson v. Bricker*, 7 Colo. 58; 49 Am. Rep. 344; *Mason v. Hughart*, 9 B. Mon. 480; *La Tourrett v. Price*, *supra*; *Sherman v. Hobart*, 26 Vt. 60.) A declaration of intention or expectation to pay the debt does not amount to a new promise. (*Brewer v. Boynton*, *supra*; *Lawrence v. Harrington*, 122 N. Y. 408; *Elwell v. Cumner*, *supra*; *Meech v. Lamon*, *supra*; *Dennan v. Gould*, *supra*; *Pierce v. Seymour*, 52 Wis. 272; 38 Am. Rep. 737; *Patterson v. Neuer*, 165 Pa. St. 66.) A part payment is not sufficient to authorize the implication of a new promise to pay. (*Lawrence v. Harrington*, *supra*; *Institution for Saving v. Littlefield*, 6 Cush. 210; *Stark v. Stinson*, 23 N. H. 259; *Allen v. Ferguson*, *supra*; *Hilliard on Bankruptcy*, sec. 53.)

Henley & Costello, for Respondent.

BELCHER, C.—On December 13, 1893, the defendant, for a valuable consideration, executed to the plaintiff his promissory note for the sum of seven hundred and fifty dollars, payable ninety days after date, with interest at the rate of two per cent per month from date until paid. On June 12, 1894, the defendant was discharged in insolvency “from all his then existing debts, and among others the said indebtedness on said promissory note above mentioned.” In the months of January and February, 1894, defendant paid on the note the interest due in those months, in April following he made a payment of twenty-five dollars, and between the months of July, 1894, and March, 1895, inclusive, he made several other payments aggregating one hundred and seventy-four dollars. He afterward refused to make any more payments, and thereupon plaintiff commenced this action. The complaint alleged, among other things, “that subsequent to the said discharge in insolvency and at various times in the months of July and August, 1894, the said defendant, Will-

iam Schmalz, promised and agreed to and with this plaintiff that he would pay to this plaintiff the full amount of said promissory note, to wit, the sum of seven hundred and fifty dollars," and that pursuant to said promise he afterward paid to plaintiff several specified sums of money; "that no part of the said sum of seven hundred and fifty dollars, which the said defendant promised to pay as aforesaid, has been paid, save and except the above mentioned amounts and also interest in the amount of fifteen dollars for January, 1894, and fifteen dollars for February, 1894." Wherefore judgment is asked for the sum of seven hundred and fifty dollars, and interest thereon from the 13th day of February, 1894, and costs.

The answer denied the principal averments of the complaint, and prayed judgment that the plaintiff take nothing by his action.

The case was tried by the court without a jury, and the court found, among other things, "that all the allegations of said complaint are true and have been fully sustained by the testimony herein, free from all exception as to its competency, admissibility and sufficiency"; and that the plaintiff was entitled to judgment against the defendant for the sum of seven hundred and fifty dollars, "with percentage and costs of suit."

Judgment was accordingly so entered, from which and from an order denying a new trial the defendant appeals.

Appellant contends that the findings were not justified by the evidence; and whether, subsequent to his discharge in insolvency, he made any promise to pay the alleged indebtedness to the plaintiff sufficient to remove the bar of the discharge is the principal point presented for decision.

When a debt has been discharged by proceedings in insolvency, or has become barred by the statute of limitations, the remedy to enforce the payment of the debt is gone, but the moral obligation to pay it still remains and is a good consideration for a new promise to make such payment. (*Chabot v. Tucker*, 39 Cal. 434; *McCormick v. Brown*, 36 Cal. 180; 95 Am. Dec. 170.) And it is well settled that when an action is brought to recover such a debt it must be based upon the new promise, and to support the action it must appear that the promise was clear, distinct, unconditional, and unequivocal.

In case of insolvency or bankruptcy the new promise may be oral, but, under our statute, to remove the bar of the statute of limitations the promise must be in writing. (Code Civ. Proc., sec. 380.)

It was proved that the note in question was given for money loaned, and that shortly after receiving it plaintiff turned it over to Miss Delia Desmond, with whom his daughter was boarding, with authority to collect the interest thereon for three months to pay the daughter's board; that plaintiff then went east, and on January 31st defendant filed his petition in insolvency; that in January and February defendant paid the interest to Miss Desmond, as before stated.

Miss Desmond testified that on March 13th she went again to collect the interest, and defendant then said: "I cannot make this payment to-day. I have failed"; that she appeared alarmed, and he said: "Don't be alarmed; I will pay Mr. Lambert every dollar of his money." And this evidence was confirmed by the daughter who was present and heard the conversation.

Plaintiff was a witness in his own behalf and testified:

"Q. State what conversation you had and what promises, if any, were made by the defendant in regard to the payment of this note. Take the last promise he made, and state the date of it and what it was. A. It was continuous. I returned from the east about the early part of March, 1894. I called at his place of business, and he told me that he had applied for a discharge from his debts; but not to feel alarmed, he would pay me every dollar of my money. At that time he paid me nothing. After that he paid me as I said before. After he had started in business again he told me to call at his place the first of every month and he would hand me twenty-five dollars."

"The Court.—When was that promise made? A. I think that was the 1st of August, or September, or October, or in that vicinity, 1894; I am not sure of the date. In August, 1894, he paid me \$25 on the first of the month, \$25 the first of September, and \$25 the first of October; I cannot be accurate about the dates; it may be a month subsequent or prior; but he paid me for three or four months promptly, and finally he stopped paying, and I commenced this suit against him."

"Q. Before you commenced this suit did you have a conversa-

tion with him about the payment of this debt? A. Yes, sir; he always told me he would pay it; at least half a dozen times; and they were thoroughly unconditional promises, and our relations were such that I believed he intended to do it. These promises were made constantly after the 12th of June, 1894. I demanded payment of him before I commenced suit; I was not paid."

The witness was cross-examined at considerable length, but the answers elicited were in effect only reiterations of the statements made by him on his examination in chief.

The question then is, Does it appear from the evidence that there was such a clear, distinct, unconditional and unequivocal new promise to pay the debt as was necessary to enable plaintiff to maintain the action?

At the end of the trial the learned judge of the court below stated: "I think in view of all the circumstances, and I am satisfied from the testimony, that there was a clear and unconditional promise to pay the amount of the indebtedness"; and this conclusion we think must be sustained.

It is true the statements made by defendant prior to his discharge, that he would pay plaintiff every dollar of his money, did not constitute such a promise as would remove the bar of the discharge, but they were proved without objection and may properly be considered as showing an intention to pay the debt in any event, and as supporting the evidence of promises subsequently made. So, too, the payments afterward made did not alone remove the bar of the discharge, or show that plaintiff had any existing cause of action, but they were testified to by both plaintiff and defendant, and clearly indicated that defendant recognized the fact that he was under some obligation to pay the debt.

The only other point made is that the judgment as entered was for a larger sum than plaintiff was entitled to recover under the new promises, as alleged and proved. The judgment was for the sum of seven hundred and fifty dollars, "together with the further sum of thirty-seven and 50-100 (\$37.50) dollars percentage," and costs of suit. The complaint alleges that in the months of July and August, 1894, defendant promised to pay plaintiff "the full amount of the said promissory note, to wit, the sum of seven hundred and fifty dollars," but there is no allegation that he promised to pay more than that sum, and that, with the inter-

est that subsequently accrued thereon, must therefore be the limit of his liability.

From the time the new promise was made and became binding the indebtedness bore interest at the legal rate. Assuming that that promise was made in July, 1894, the interest up to the time the judgment was entered would amount to only about seventy-four dollars. The payments made before the discharge were properly applied to the payment of the interest then accrued on the note, but the payments made after the new promise were sufficient to pay the said sum of seventy-four dollars interest and one hundred dollars of the debt. And so far as we can see there was no ground for awarding the plaintiff \$37.50 "percentage."

It follows, we think, that the judgment and order appealed from should be reversed and the cause remanded for a new trial, unless the respondent shall, within twenty days after the remittitur is filed in the court below, satisfy the judgment to the extent of \$137.50 and the interest accrued on that sum, in which event the judgment so reduced should stand affirmed, without costs to either party in this court.

Searls, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause remanded for a new trial, unless the respondent shall, within twenty days after the remittitur is filed in the court below, satisfy the judgment to the extent of \$137.50 and the interest accrued on that sum, in which event the judgment so reduced shall stand affirmed, without costs to either party in this court.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

[S. F. No. 535. Department Two.—September 4, 1897.]

BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO, Appellant, v. JOHN GRANT et al., Respondents.

LANDLORD AND TENANT—LEASE—TITLE OF PERMANENT BUILDINGS.—Where leases of land for a term of years contained no covenant or provision that the lessees might remove buildings erected by them during the term, upon permanent foundations embedded in the soil, nor that the lessor would purchase or pay therefor, and such buildings remain on the land until after the expiration of the leases, they are part of the realty, and belong to the owner of the land.

ID.—LEASE OF SCHOOL LOTS BY CITY—ADVERTISEMENT BY SUPERVISORS—PROVISION FOR REMOVAL NOT EMBODIED IN LEASE.—Where a notice published by order of the board of supervisors in advertising for proposals to lease school lots provided that all improvements on the lots, unless purchased or paid for by the city and county, should be removed at the expiration of the lease by the owners thereof, etc., but no such provision was inserted in the leases authorized to be executed by the mayor, such provision does not form part of the lease, and the rights of the parties must be measured alone by the terms of the lease.

ID.—PRELIMINARY NEGOTIATIONS—LEGAL EFFECT OF LEASE—ABSENCE OF FRAUD OR MISTAKE.—Preliminary negotiations leading up to a lease, and not embodied in it, constitute no part of the final binding contracts of the parties, and the legal effect of the lease cannot be changed by reference to such preliminary negotiations, in the absence of a charge of fraud or mistake.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, upon submission of a controversy without action. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Rodgers & Paterson, and Harry T. Creswell, City and County Attorney, for Appellant.

The buildings in question are parts of the realty. (Civ. Code, secs. 658, 660.) The board of supervisors had no power to provide that title to such buildings should remain in the lessee, it not having been conferred upon them by the statute. (*Zottman v. San Francisco*, 20 Cal. 102; 81 Am. Dec. 96; *French v. Teschemaker*, 24 Cal. 550; *Nicolson etc. Co. v. Painter*, 35 Cal. 699

McCoy v. Briant, 53 Cal. 250; *Smith v. Morse*, 2 Cal. 538-39; *Grogan v. San Francisco*, 18 Cal. 609; *Herzo v. San Francisco*, 33 Cal. 143; *Payne v. Treadwell*, 16 Cal. 234; *People v. McClin-tock*, 45 Cal. 11.) The lease was the final expression of the agreement of the parties, and superseded all previous negotia-tions. (*West Coast Lumber Co. v. Apfield*, 86 Cal. 335-40; *Hallett v. Wylie*, 3 Johns. 44; 3 Am. Dec. 457; *Jackson v. Clark*, 3 Johns. 424; *Jackson v. Meyers*, 2 Johns. 388; 3 Am. Dec. 504; *Kabley v. Worcester Gas Light Co.*, 102 Mass. 394; *Mayer v. Mc-Creery*, 119 N. Y. 434, 439-41; *Abbott v. '76 Land & Water Co.*, 101 Cal. 567, 570.)

Mich. Mullany, and Ryland B. Wallace, for Respondents.

A municipal corporation has powers fairly implied in or in-cident to the powers expressly granted. (1 Dillon on Munici-pal Corporations, sec. 89; 15 Am. & Eng. Ency. of Law, 1041.) The lease became operative as to its terms when the bids made upon the terms proposed in the advertisement were ac-cepted; and the lease is not in conflict with the previous con-tract, and cannot affect the rights of the tenants to their im-provements thereunder. (*Sivers v. Sivers*, 97 Cal. 518; *San Francisco v. McGinn*, 67 Cal. 110; *People v. Board of Super-visors*, 27 Cal. 678.) The board and not the mayor was au-thorized to make the contract, and its award of the lease constituted the contract. It could not delegate its power to contract to the mayor. (15 Am. & Eng. Ency. of Law, 1043; *Meuser v. Risdon*, 36 Cal. 239; 95 Am. Dec. 181.) Proof is ad-missible of any collateral agreement which does not interfere with the terms of the written contract. (*Barshor v. Forbes*, 36 Md. 166; *Guidery v. Green*, 95 Cal. 635; *Chapin v. Dobson*, 34 Am. Rep. 512; *Powelton etc. Co. v. McShain*, 75 Pa. St. 238; 17 Am. & Eng. Ency. of Law, 443.)

THE COURT.—This is an agreed case submitted to the superior court of the city and county of San Francisco, under sections 1138, et seq., of the Code of Civil Procedure. The con-test is between the board of education of said city and county, who is appellant here, and John Grant and a number of other persons who are here respondents. Judgment was rendered in the court below for the respondents, and the board of education

appeals. The controversy is as to the ownership of certain permanent buildings erected by the respondents upon certain school lots owned by the appellant.

The legislature, by an act approved March 30, 1874, authorized the board of supervisors of said city and county to lease for a term of twenty years certain parts of a one hundred vara school lot (No. 128), on the southwest corner of Market and Fifth streets, in said city and county. In pursuance of the authority granted by said act the board caused the land authorized to be leased to be surveyed and divided into eleven lots, each being twenty-five feet front, and executed leases to the respondents or their predecessors in interest—all the leases being substantially similar, and each being of one or more of the subdivisions of said land. The leases were for twenty years, and were executed by the board through the mayor, he having been authorized by the board to execute the leases. During the term of the leases the respective lessees excavated the soil of the lots "to an average depth of nine feet, and upon and in said soil so excavated built and laid brick foundation walls imbedded in the soil, and upon said foundation walls erected buildings, all of said buildings except the building erected on said lot No. 3 being frame, wooden buildings, four stories in height above the basement, and the building so erected upon said lot No. 3 being a brick building, three stories in height above the basement." All of the buildings remained on the land until after the expiration of the leases, and are still on said land. These buildings are, therefore, under both common and statutory law, part of the realty, and belong to the owner of the land in the absence of any covenant in the leases providing otherwise. And in neither of the leases involved here is there any covenant or provision that the tenants might remove the buildings. It is clear, therefore, that under the leases in question the buildings in controversy belonged at the expiration of the terms of said leases to the appellant, the board of education.

The respondents endeavor to avoid this apparently inevitable conclusion by contending that the leases are to be considered as changed or modified by a certain advertisement made by the board of supervisors for proposals to lease said lots, which contained the following: "All improvements on said lots, unless

purchased by the city and county, shall be removed at the expiration of the lease by the owners thereof, upon thirty days' notice being given by the mayor of the city and county; and, if not so removed prior to the expiration of said lease, the right shall be forfeited, and the ownership of the same shall vest in the city and county of San Francisco." Appellant contends that this provision, even if it had been made part of the lease, would have been beyond the power of the board of supervisors to make; that under the act from which they derived their authority they had no power to contract for the purchase of improvements; that no provision was made for any funds to make such purchase; and that the powers of said board were strictly limited by the terms of the act, which did not include the authority to make any such a provision. We do not deem it necessary to discuss this contention, because the said provision did not form part of the lease, and by the lease alone are the rights of the parties to be measured. After proposals were received the board passed a resolution with respect to each of the respondents or his predecessor, to the effect that a lease for twenty years of a particular lot was awarded to him; that the lease was to commence and the first payment to be made five months from the date possession of the lot was given; and that "the mayor is hereby authorized and empowered to execute the aforesaid lease on behalf of this city and county under such conditions and restrictions as may be by him considered necessary and proper to protect the public interests, on receiving a liquidated damage bond with at least two sureties, conditioned that the person to whom the lease is awarded, his successors and assigns, shall observe the conditions *thereof*, and pay the monthly rental when due during the continuance of the same." Afterward leases were made by the mayor in the name of the said city and county, and bonds were given by the respondents to the effect that they would observe the conditions *thereof*, and the lessee was freed from paying rent until five months after he took possession; and in the leases there were no stipulations, covenants, or conditions whatever as to the removal of the buildings. On the contrary, there was an express covenant in each lease by the lessee that at the expiration of the lease he would "peaceably and quietly leave, surrender, and yield up unto the said party of the first part, her successors or assigns, all and

singular the said demised premises, reasonable use and wear thereof and damages by the elements excepted." The ambiguous paragraph of the advertisement for proposals above quoted, the resolutions directing leases to be made by the mayor, a certain report of the finance committee of the board recommending that the lessee should be given five months free of rent to erect buildings, and certain other antecedent matters, were mere parts of the preliminary negotiations leading up to the leases; but the leases, and they alone, constituted the final binding contracts of the parties by which their rights in the premises were fixed.

This is not only so as a matter of law, in the absence of any charge of fraud or mistake (*Abbott v. '76 Land & Water Co.*, 101 Cal. 567; *West Coast etc. Co. v. Apfield*, 86 Cal. 335), but it was evidently so understood and contemplated by the parties. The resolutions authorizing leases to be made expressly provided that they should be made through the mayor, under such "conditions and restrictions" as he should consider necessary and proper to protect the public interests, and that bonds should be given securing the compliance of the lessees with "the conditions thereof"—that is, with the conditions of the leases to be executed by the mayor; the respondents accepted the leases and gave the bonds, and must be presumed to have known what they were doing. Moreover, there is no averment or pretense of mistake or fraud. Neither the advertisement nor the resolution of award was a lease or part of a lease. The resolution of award was a mere agreement to have executed a lease of the character indicated in the resolution itself; and such a lease was afterward, in accordance with the resolution, executed by the parties, which was, of course, the ultimate expression of the contract. The clause of the advertisement above quoted is scarcely susceptible of any definite meaning; but if it be construed as showing that at one time the project of allowing the lessees to remove permanent buildings was considered, it was simply a preliminary suggestion which was not finally adopted—an occurrence quite common in negotiations leading up to a contract. It is not improbable that the board concluded that it had no power, under the special statute authorizing it to act in the premises, to contract for the purchase of such buildings as the lessee might choose to put on the land; and, as suggested by counsel for appellant, the

privilege of occupying the land for a certain time free of rent, which was not at first contemplated, was probably accepted by the lessees in lieu of any right which may at one time have been considered of removing buildings. But the motives which, in this case, induced the final contract are beyond judicial inquiry; the lease is the thing which fixes the right of the lessor and lessee.

There is nothing in *San Francisco v. McGinn*, 67 Cal. 111, which affects the case at bar. That case merely involved the question whether one of the buildings here in contest was, during the running of the term, taxable to one of the respondents as "improvements"—the lessee denying that he owned the same; and the court merely held that "for the purposes of revenue" the lessee was to be considered as owner of the improvements and liable for the tax. The respondent was not a party to the action; the question arose during the term of the lease; the lessee at that time certainly had some interest in the improvement; and the court held that such interest was taxable. Neither is there anything in *Sivers v. Sivers*, 97 Cal. 518, that is of importance here. That case merely involved an agreement to pay money, and not any interest in realty; the written agreement to pay did not fix any time for payment, and the court below held that the money was payable on demand, which ruling was approved by this court; and that was conclusive of the case. The court said, however, in its opinion, that in such a case, where the writing was silent as to the time of payment, evidence of a "contemporaneous" oral agreement as to such time was admissible. If this be considered as more than *dictum*, still it has no applicability to the case of a lease of real property when one party seeks to change its legal effect by reference to prior preliminary negotiations.

For the reasons above given the judgment of the lower court is erroneous, and as the case is presented upon an agreed statement there is no necessity for a new trial.

The judgment appealed from is reversed, and the superior court is instructed to render judgment for the appellant, the board of education, in accordance with the prayer.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[S. F. No. 585. Department Two.—September 4, 1897.]

SAMUEL DAVIS, Respondent, v. PACIFIC IMPROVEMENT CO. et al., Defendants. GEORGE T. LAWRENCE et al., Appellants.

PARTITION—PROOF OF TITLE—SHERIFF'S DEED TO COMMON GRANTOR—SUFFICIENCY OF DESCRIPTION—REVIEW UPON APPEAL.—In an action of partition, where all of the parties who set up any title base their rights under conveyances from a common grantor, the sufficiency of the description, or validity of a sheriff's deed to such common grantor, need not be determined upon appeal, as, if such common grantor had no title, appellants have no interest in the premises involved, and are not concerned in the judgment.

ID.—PROOF OF DELIVERY OF DEED—AUTHENTICATED COPY OF RECORD.—In the absence of contrary proof, an authenticated copy of the record of a deed is sufficient proof to establish the fact of its delivery.

ID.—EXCLUSION OF SECOND DEED FROM COMMON GRANTOR—HARMLESS RULING. Where a first deed from a common grantor of appellants and respondents was received in evidence in support of the title of respondents, and a second deed from the same grantor, which was subsequently executed, and which, if admitted, would be worthless, and could not change the aspects of the case, there being no evidence to show the invalidity of the first deed, was excluded from evidence as being incompetent, irrelevant, and immaterial, and for the reason that it appeared that the grantor had no title at its date, he having before that parted with his title under the first deed, such exclusion is not prejudicial or reversible error.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Frank Sullivan, Ryland B. Wallace, T. M. Osmont, Garber, Boalt & Bishop, L. M. Hoeffler, S. M. Shortridge, and George E. Lawrence, for Appellants.

In partition suits each party must rely upon his own title, and if the plaintiff fails to make out a sufficient case, the court must grant a nonsuit and dismiss the action. (*Ripple v. Gilborn*, 8 How. Pr. 456; *Porter v. Lee*, 6 How. Pr. 491; *Hamilton v. Morris*, 7 Paige, 39; *Larkin v. Mann*, 2 Paige, 27; *Griggs v.*

Peckham, 3 Wend. 436.) The burden is on the plaintiff to prove that he has an interest in the land of which he asks partition. (*Gilman v. Stetson*, 16 Me. 124; 5 Wait's Actions and Defenses, 97; Code Civ. Proc., secs. 1869, 1961.) The description in the sheriff's deed under which plaintiff claimed title was too vague and uncertain to identify the property, and no title passed thereunder. (*Throckmorton v. Moon*, 10 Ohio, 42; *McGary v. Dunn*, 1 La. Ann. 338; *Jackson v. Roosevelt*, 13 Johns. 97; *Clemens v. Rannels*, 34 Mo. 579; 6 Wait's Actions and Defenses, 744; *People v. Klumpke*, 41 Cal. 263; *Tryon v. Huntoon*, 67 Cal. 325; *Caldwell v. Center*, 30 Cal. 539; 89 Am. Dec. 131; *Cadwalader v. Nash*, 73 Cal. 46; *Keane v. Cannovan*, 21 Cal. 291; 82 Am. Dec. 738; *Brandon v. Leddy*, 67 Cal. 43; *Mesick v. Sunderland*, 6 Cal. 297; *Sneed v. Woodward*, 30 Cal. 430; *Dickens v. Barnes*, 79 N. C. 490.) Delivery is absolutely essential to pass title. The legal presumption of the delivery of a deed arises from the signing and acknowledgment. The party claiming under it must prove its delivery. Recording is not delivery. (*Barr v. Schroeder*, 32 Cal. 609; *Boyd v. Slayback*, 63 Cal. 493; *Fitch v. Bunch*, 30 Cal. 208; *Hibberd v. Smith*, 67 Cal. 547; 56 Am. Rep. 726; *Bank v. Bailhache*, 65 Cal. 327; *Harris v. Harris*, 59 Cal. 620; *Ward v. Dougherty*, 75 Cal. 240; 7 Am. St. Rep. 151.) A deed does not become effective unless a delivery is made with the assent of the grantor. (*Black v. Sharkey*, 104 Cal. 280; *Gould v. Wise*, 97 Cal. 532; *Dean v. Parker*, 88 Cal. 283; *Bury v. Young*, 98 Cal. 446; 35 Am. St. Rep. 186; *Ord v. Ord*, 99 Cal. 525, 526.) The presumption of delivery is not conclusive and may be overcome by evidence or counter-presumption arising from the circumstances in proof. (Code Civ. Proc., sec. 1961.) In view of the fact that Hodgdon allowed Rising to make a second deed, and allowed the grantees under the second deed to pay all taxes on the premises for thirty-eight years, the presumption of delivery to Hodgdon is overcome by the counter-presumptions that Rising was innocent of crime in making the second deed, and that those exercising ownership were the owners of the property. (*Knolls v. Barnhart*, 71 N. Y. 474.) The presumption of innocence outweighs the other presumption and must in all cases prevail. (*Case v. Case*, 17 Cal. 600; *People v. Anderson*, 26 Cal. 133; *People v.*

Beevers, 992 Cal. 89; *Kilburn v. Kilburn*, 89 Cal. 46; 23 Am. St. Rep. 447; *People v. Feilen*, 58 Cal. 218; 41 Am. Rep. 258.)

Freeman & Bates, for Respondent Davis.

Appellants have no interest in the property partitioned, and ought not to be heard as appellants in this case, not being prejudiced by the judgment. (*In re Blythe*, 108 Cal. 124; *Gates v. Salmon*, 46 Cal. 361, 375; *Pearson v. Creed*, 78 Cal. 144.) Appellants, having set up a claim under Rising, are estopped to contest his ownership of the property. (*Frink v. Roe*, 70 Cal. 305; *McDonald v. Hannah*, 59 Fed. Rep. 977; *Horning v. Sweet*, 27 Minn. 277; *Orton v. Noonan*, 19 Wis. 356; *Mickey v. Stratton*, 5 Saw. 475, 479; *Gaines v. New Orleans*, 6 Wall. 715; *Ames v. Beckley*, 48 Vt. 402; *Butcher v. Rogers*, 60 Mo. 140; *Spect v. Gregg*, 51 Cal. 200; *Gilliam v. Bird*, 8 Ired. 280, 283; 49 Am. Dec. 379; *Bolling v. Teel*, 76 Va. 493.) Registration of the deeds was *prima facie* evidence of their delivery. (Devlin on Deeds, sec. 292; *Moore v. Giles*, 49 Conn. 570; *Bensley v. Atwill*, 12 Cal. 231; *Green v. Green*, 103 Cal. 110; *Anthony v. Chapman*, 65 Cal. 76; Civ. Code, sec. 1055; *Ward v. Dougherty*, 75 Cal. 240; 7 Am. St. Rep. 151.)

McFARLAND, J.—This action was brought for a partition of land situated in the city and county of San Francisco, commonly known as South Beach block No. 26. It is averred in the complaint that the plaintiff is the owner of the undivided one-half of said property for the term of ninety-nine years; facts are averred tending to show that the defendant, the Pacific Improvement Company, is the owner of the other undivided one-half; and it is averred that the other defendants, who are quite numerous, claim some interest in the premises. The Pacific Improvement Company averred in its answer that it is the owner of the undivided one-half of said premises, and prays for a partition as asked by the plaintiff. The defendant Lawrence merely denies the averments of the complaint, and the other defendants set up title in severalty to various parts of the said premises, and deny that either the plaintiff or the said improvement company have any interest in any of the premises. The court below found by its interlocutory decree that the plaintiff was the owner of an undivided

one-half interest in the premises in controversy; that the defendant, the Pacific Improvement Company, is the owner of the other undivided one-half interest; and that neither of the other defendants has any right, title, or interest in the premises, or any part thereof. All the defendants except the Pacific Improvement Company appeal from the judgment and from an order denying their motion for a new trial.

None of the parties were in possession of any part of the premises in contest except the Pacific Improvement Company, which took actual possession of all said premises in the year 1891 or 1892, and was in the actual possession at the time this suit was commenced.

The evidence showed that in 1851 the premises in contest here belonged to the city of San Francisco; that in said year one Peter Smith obtained judgment against the city of San Francisco for a large sum of money; that an execution was issued upon said judgment under which the property was sold by the sheriff to one George W. Daniels, and a deed made to him by the sheriff on the twenty-sixth day of June, 1851; that by mesne conveyances the title which Daniels received by virtue of said sheriff's deed was vested in one David B. Rising; that Rising, on March 30, 1853, conveyed the said premises by deed to James G. Hodgdon; and that the title thus conveyed to Hodgdon afterward vested—the undivided one-half in plaintiff Davis and the other undivided half in the said Pacific Improvement Company. A great deal of the argument of appellants is to the point that the deed from the sheriff to George W. Daniels was so defective in description of the property intended to be conveyed as to be worthless as a conveyance of said block 26. In the body of the deed the expression "lot 26" was used instead of "block 26"; but the returns of the sheriff on the execution were introduced by plaintiff without objection, and it is contended by plaintiff that the deed, together with said returns and certain other matters put in evidence, show that the deed clearly referred to block 26. But we do not think it necessary to pass definitely upon this point, for all of the appellants who set up any right or title whatever to any of the premises in contest base their right under conveyances from said Rising, who was thus the common grantor of the appellants and the respondents. If Rising had no title, then the appellants have

no interest in any of the premises involved, and are not concerned in the judgment.

Appellants contend that respondents show no title because there was no actual proof of a delivery of the deed from the sheriff to Daniels, or of the deed from Rising to Hodgdon, both of which deeds were recorded about forty years before the commencement of this suit. With respect to the deed of Daniels, a certified copy of which was offered in evidence, it would be sufficient to say that no objection to the introduction of said deed was made upon the ground that it was never delivered; and, as to the deed from Rising to Hodgdon, it is averred in the answers of the parties claiming any interest in the premises that said deed was delivered. Moreover, the copy of the record in each case was evidence sufficient, in the absence of contrary proof, to sustain a finding of the delivery of the deed. In *Anthony v. Chapman*, 65 Cal. 76, the court said: "The objection to the introduction of a duly certified copy of the record of a deed from Thomas Adams, Jr., to Robert J. Bell, 'on the ground that it was irrelevant and immaterial, and that there was no proof as to the genuineness, due execution, or delivery of the original deed,' was properly overruled. The authenticated copy of the record was *prima facie* evidence of the genuineness, due execution, and delivery of the original deed." The due recordation of a deed is certainly some evidence of its delivery, and after the lapse of many years is strong evidence; and in either case it is, when there is no evidence to the contrary, sufficient to establish the fact of delivery. If the law were otherwise it would be impossible in many cases to deraign title from a source at all remote. (See Devlin on Deeds, sec. 292, and cases there cited.)

Some of appellants offered in evidence a deed for part of the premises from said Rising and two other persons who were his copartners in business, executed subsequently to the said deed from Rising to Hodgdon; respondents objected to its introduction upon the grounds that it was incompetent, irrelevant, and immaterial, and that it appeared that Rising had no title at the date of said deed, he having before that parted with his title to Hodgdon; the objection was sustained, and it is contended that this ruling was erroneous. It was certainly not reversible error. If the deed had been admitted it would have been worthless, and its

admission in evidence would not in any way have changed the aspects of the case. It seems that at one time some of the appellants claimed that the deed from Rising to Hodgdon was void because made with intent to defraud creditors, and there are averments to that effect in some of the answers in the case at bar; but there was no evidence offered on that point, and it appears to have been definitely adjudicated against appellants in the case of *Frink v. Roe*, 70 Cal. 296.

We see no other points which call for discussion.

The judgment and order appealed from are affirmed.

Henshaw, J., and Temple, J., concurred.

Hearing in Bank denied.

[Crim. No. 213. Department Two.—September 4, 1897.]

THE PEOPLE, Respondent, v. JOHN W. MAXWELL, Appellant.

CRIMINAL LAW—PERJURY—FALSE OATH IN INSOLVENCY.—Under section 124 of the Penal Code, the crime of perjury, in making a false oath to a petition and schedules in insolvency, is completed when, at the instance of the defendant, the papers are filed in court; and an information therefor should allege the falsity of the oath as of that time.

ID.—INSUFFICIENT EVIDENCE OF OFFENSE.—Under section 1968 of the Code of Civil Procedure, requiring as indispensable evidence to a conviction of perjury the testimony of two witnesses, or of one witness and corroborating circumstances, an insolvent debtor, accused of perjury in falsely swearing to a schedule of assets which omitted a particular promissory note, cannot be convicted upon mere evidence of his ownership of the note some months prior to the filing of his petition in insolvency, of his subsequent possession thereof, and of his admission to sundry persons that he had money or resources with which to pay his debts.

APPEAL from a judgment of the Superior Court of Napa County and from an order refusing a new trial. E. D. Ham, Judge.

The facts are stated in the opinion of the court.

Dinkelspiel & Gesford, and E. L. Webber, for Appellant.

W. F. Fitzgerald, Attorney General, Henry E. Carter, and Charles H. Jackson, Deputies Attorney General, for Respondent.

THE COURT.—Defendant, convicted of the crime of perjury, appeals from the judgment, from the order denying his motion in arrest of judgment, and from the order denying his motion for a new trial.

The perjury charged was a false oath made by defendant as to matters contained in his petition and schedules in insolvency.

It is first insisted that the information is defective and fails to charge the crime in this, that it is alleged that at the time defendant filed his petition and schedules in insolvency he was the owner of a note referred to in the information and alleged to have been omitted from the schedules, but no charge is made that at the time defendant took the oath he was the owner of the note, and it is insisted that the falsity of the oath must be determined by the state of facts existing at the time the oath was taken, and not at the time when the petition was filed. The petition and schedules bear date May 20, 1895, and were filed in the superior court of Napa county upon that date. Appellant's contention is completely disposed of by the provisions of section 124 of the Penal Code: "The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true." In this case the offense was completed when at the instance of defendant the papers were filed in the court. (See *People v. Robles*, 117 Cal. 681.)

It is further insisted upon the part of appellant that the evidence is insufficient to sustain the verdict and judgment; that the conviction was had upon circumstantial evidence alone, and that there was an absence of the positive testimony of two witnesses, or of one witness and corroborating circumstances, required by the law before conviction in such a case as this can be had. (Code Civ. Proc., sec. 1968; *People v. Wells*, 103 Cal. 631; *People v. Porter*, 104 Cal. 415.)

The evidence upon the part of the people showed that some months prior to the date of filing the petition defendant was the

owner of a promissory note for sixteen hundred dollars made to him by George W. Reid, Archie McKenzie and George S. McKenzie. Three or four hundred dollars had been paid upon the note before the petition was filed. This note was not included by the insolvent amongst his assets; and it became incumbent upon the prosecution to show that at the date of the filing of the petition and schedules in insolvency the defendant was in fact the owner thereof.

Reid, one of the makers of the note, testified for the prosecution that after May 20, 1895, he paid moneys to one R. K. Thompson on this note, and took Thompson's receipt therefor. The receipts were in evidence. About four months after the petition was filed by defendant he and Reid met and a new note was executed by Reid for the unpaid balance of the old note, and the latter was destroyed. The new note was made payable to defendant, and was signed by Reid and one Smeltzer, but not by the McKenzies. Reid, asked on cross-examination why he made the payments to Thompson, answered, because he held the note; and he further stated that Thompson held it prior to May 20, 1895. He also testified that he saw an assignment written on the back of the note by Maxwell to Thompson; that Maxwell owed Thompson something, as he understood it, and indorsed the note to Maxwell to secure him. This was before the petition was filed.

The further evidence in the case consists of testimony as to admissions made by defendant after the petition was filed. That evidence may be thus summarized: Welti, a creditor of defendant, testified that defendant, the day after the petition was filed, showed him the note in question, and said he had money enough to pay all his debts from money coming on the note. He did not look to see if it was indorsed; did not know its date of payment, saving that defendant told him it would not be due for a month or two. He remembered that the note was for sixteen hundred dollars, and was payable to John Maxwell. Stoddard, another creditor, testified that the day after defendant filed his petition he stated to the witness that he had means to pay what he owed him, and would pay him. He further testified that a day or two before defendant filed his petition defendant stated to witness that he, defendant, could take back the stable (for the purchase of which the note had been given), by giving up the security that

he had for the stable, and that he could not pay witness, as Reid was not paying for the stable according to agreement. George S. McKenzie testified that he demanded the note as assignee in insolvency from defendant, and defendant told him the note belonged to Mr. Thompson before he went into insolvency, and that it was partly paid before he had assigned it to Thompson. Gable testified that in August, 1895, he asked defendant to lend him one hundred and fifty dollars and defendant told him he had the money, but would have to get an order from Bob Thompson for it. Witness did not state what Bob Thompson defendant referred to.

It is at once apparent that there is not here the testimony of two witnesses bearing evidence to the corpus delicti, nor yet the direct evidence of one witness supported by corroborating circumstances. The evidence is all in its nature circumstantial. The utmost effect that can be given to the admissions of the defendant, testified to by the witnesses, is that after the date of the alleged perjury he had the promissory note in his possession (with the presumption of ownership attaching thereto), and that he stated to sundry persons that he had money or resources with which to pay his debts.

Section 1968 of our Code of Civil Procedure, requiring as indispensable evidence to a conviction of perjury the testimony of two witnesses or of one witness and corroborating circumstances, is a statutory enactment of the rule which prevailed at common law. It may be argued with much force that in adopting this rule it was adopted in the light of the decisions of the common-law courts in interpretation of it. From the eminence of the tribunal which has declared it, one of those decisions entitled to the utmost respect is that of the supreme court of the United States in *United States v. Wood*, 14 Pet. 430. That decision was handed down in 1840, and the contention that the rule of common law enacted in our code is to be interpreted by its light is entitled to much weight. The defendant was there indicted under the revenue collection laws for the crime of perjury, alleged to have been committed in falsely swearing to the purchase price of certain goods imported by him. There was an absence of the testimony of living witnesses to the offense. Its place was supplied by the books of defendant and by his letters and cor-

respondence with his father, an English merchant, from whom the purchases were made. By these it was made to appear that he had entered into a conspiracy with his father to defraud the government of the United States by false invoices and returns, and that the price in fact paid by him for the goods was much greater than that to which he had sworn. After elaborate consideration of the question, the court thus sums up the matter: "In what case, then, will the rule not apply? Or in what cases may a living witness to the corpus delicti of a defendant be dispensed with, and documentary or written testimony be relied upon to convict? We answer, to all such where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent. In cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; the oath only being proved to have been taken. In cases where a party is charged with taking an oath contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited in it."

We do not stop here to decide whether the rule as thus interpreted should govern this court in its construction of section 1968 of the Code of Civil Procedure, for the evidence in this case by no means comes up to that rule. Of positive testimony there is none, nor is there any documentary or written evidence by which its place may be supplied. Even if the parol admissions of a defendant covering directly the matter charged could under any circumstances be held sufficient, as a substitute for the required documents, the evidence here introduced falls far short even of that. The admissions do not go directly to the matter charged, but to collateral matters from which the jury was asked to draw the inference of guilt.

The evidence in this regard being wholly insufficient, for this reason the judgment and order are reversed and the cause remanded.

[S. F. No. 518. Department One.—September 8, 1897.]

LORIN FOX, Respondent, v. OAKLAND CONSOLIDATED
STREET RAILWAY, Appellant.

**NEGLIGENCE—OPERATION OF ELECTRIC RAILWAY—DEATH OF CHILD—APPEAL—
CONFLICTING EVIDENCE—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.**

The credibility of witnesses is a question for the jury; and where, in an action for negligence against an electric railway company for such careless operation of its cars as to cause the death of an infant child of the plaintiff, the testimony of two witnesses for the plaintiff tends to prove the negligence of the defendant, as against conflicting evidence to the contrary, a verdict of the jury for the plaintiff cannot be disturbed upon appeal, upon the ground that such witnesses were unworthy of credence, where there is nothing so inherently or otherwise manifestly incredible in their testimony as to justify the court in ignoring it.

ID.—NEGLIGENCE, WHEN A QUESTION OF FACT.—Negligence is not absolute, but is relative to circumstances, and it is very rarely that a set of circumstances is presented which enables the court, as matter of law, to say that negligence has been shown, but, as a general rule, it is a question of fact, or of inference of fact, to be deduced by the jury from the circumstances proved; and even conceded facts, where there is no conflict in the evidence, may as readily afford a difference of opinion as to the inferences and conclusions to be drawn therefrom, as in cases where the evidence is conflicting, and where there is room for such difference, the question is one of fact for the jury.

ID.—CONTRIBUTORY NEGLIGENCE OF PARENTS—CARE OF CHILD—DEBATABLE QUESTION.—Parents are chargeable with ordinary care in the protection of their minor children; and where a young child had been told by its mother not to leave the house, and she supposed that he remained in the house, but the child left it contrary to her command, while she was engaged in washing, and wandered to another street, where the electric cars were running, and where he had been frequently told not to go, and was there run over and killed, the question whether the conduct of the mother, in permitting the child to be out of her sight for a period of fifteen or twenty minutes, without satisfying herself of its whereabouts, was, under all the circumstances, a want of ordinary care, is a fairly debatable question, which the jury are to determine.

ID.—LIABILITY FOR GROSS NEGLIGENCE—CONTRIBUTORY NEGLIGENCE NOT CONTROLLING.—Where there is evidence tending to show that when the child went upon the railway track, he was a sufficient distance in advance of the approaching car to have enabled those in charge of the car, by the exercise of ordinary care, to have stopped before striking the child, such evidence tends to show gross negligence on the part of the defendant's servants, and to justify a finding for plaintiff, notwithstanding the negligence of the parents in permitting the child to be in the street.

ID.—DUTY TO AVOID INJURY TO NEGLIGENT PERSON.—A party having an opportunity, by the exercise of proper care, to avoid injuring another, must do so, notwithstanding the latter has placed himself in the situation by his own negligence or wrong.

ID.—EVIDENCE—POVERTY OF PLAINTIFF—INABILITY TO EMPLOY SERVANTS TO KEEP CHILD—CONTRIBUTORY NEGLIGENCE—ERRONEOUS INSTRUCTIONS.—Evidence that the plaintiff had no servants, and was too poor to employ any to keep his child, has no relevant or competent bearing upon the question whether he has given the child that degree of care which the law requires at his hands, and it is erroneous to instruct the jury that the fact that plaintiff is a poor man, if true, is a matter to be considered by them in determining whether or not he has been guilty of contributory negligence.

ID.—EXCESSIVE VERDICT—PECUNIARY VALUE OF SERVICES OF INFANT.—The jury can award nothing in the way of penalty for the death of the child, nor for the sorrow or grief of his parents, but must confine their verdict to an amount which will justly compensate the father who sues for the death for the probable value of the services of the child during his minority, taking into consideration the cost of his support and maintenance during the early and helpless part of his life; and the deprivation of the comfort, society, and protection of the son can only be considered as affecting the pecuniary value of his services to the plaintiff; and a verdict for six thousand dollars for the death of an infant child four and a half years of age, at suit of the father, is excessive, and must be deemed to have been prompted by improper motives on the part of the jury.

ID.—PLEADING—SEPARATE AVERMENTS OF DAMAGE—LOSS OF SOCIETY—LOSS OF EARNINGS—ELECTION.—Where the complaint averred that by the death of the child, caused by the negligence of the defendant, plaintiff had been deprived of the society and companionship of said child, to his damage in the sum of fifty thousand dollars, and further averred that plaintiff had been deprived of his services and earnings of the reasonable value of eight thousand dollars, wherefore plaintiff demanded judgment in the aggregate sum of fifty-eight thousand dollars, it is not error for the court to refuse to require plaintiff to elect upon which of the two separate averments of damage he would rely, the matters alleged not being properly the subjects of separate averments, the loss of society, etc., being but an element in estimating the value of the services; and the objection to the manner of pleading is not to be reached by such motion, though it might, perhaps, be reached by a demurrer for uncertainty or ambiguity.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. F. B. Ogden, Judge.

The averments of the complaint upon the subject of damages were substantially as set forth in the last syllabus. The main facts of the case are stated in the opinion of the court.

Chickering, Thomas & Gregory, and Fitzgerald & Abbott, for Appellant.

The poverty of the plaintiff was not competent to show freedom from contributory negligence. (*Mayhew v. Burns*, 103 Ind. 328; *Indianapolis etc. Ry. Co. v. Pitzer*, 109 Ind. 179; 58 Am. Rep. 387; *Patterson's Railway Accident Law*, 77; *Mahoney v. San Francisco etc. Ry. Co.*, 110 Cal. 471, 476.) The law does not set up one standard by which to determine the rights or measure the conduct of the rich, and another for the poor. (*Hagan's Petition*, 5 Dill. 96; *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414; *Delphi v. Lowery*, 74 Ind. 520; 39 Am. Rep. 98; *Pittsburgh etc. Ry. Co. v. Powers*, 74 Ill. 341; *Chicago v. O'Brennan*, 65 Ill. 160; *Sherlock v. Alling*, 44 Ind. 184; *Illinois Cent. R. R. Co. v. Baches*, 55 Ill. 388; *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339; 98 Am. Dec. 229; *Chicago etc. Ry. Co. v. Bayfeld*, 37 Mich. 205.) We contend that when the evidence is not conflicting, and where the facts are admitted or proved without contradiction, as in the case at bar, it was the duty of the court to determine whether or not plaintiff or his child were guilty of contributory negligence, and that the court should not have submitted to the jury the question as to whether or not the parents exercised reasonable care to prevent the escape of the child onto the street. This rule has been settled by the following cases: *Stevenson v. Southern Pac. Co.*, 102 Cal. 143, 144; *Davis v. California Street C. R. R. Co.*, 105 Cal. 131, 136; *Fernandez v. Sacramento etc. Ry. Co.*, 52 Cal. 45; *Orcutt v. Pacific Coast Ry. Co.*, 85 Cal. 291, 298; *Glascock v. Central Pac. R. R. Co.*, 73 Cal. 137; *Bailey v. Market Street C. Ry. Co.*, 110 Cal. 321, 329. The contributory negligence of the parents in permitting their child to be in a place of danger is, in law, the proximate cause of the accident. (*Booth on Street Railways*, sec. 390; *Karr v. Parks*, 40 Cal. 188; *Roller v. Sutter Street R. R. Co.*, 66 Cal. 230; *Toledo etc. Ry. Co. v. Grable*, 88 Ill. 441; *Louisville etc. Ry. Co. v. Murphy*, 9 Bush, 522; *Williams v. Railway Co.*, 60 Tex. 205; *Pittsburgh etc. Ry. Co. v. Vining*, 27 Ind. 513; 92 Am. Dec. 269; *St. Louis etc. Ry. Co. v. Freeman*, 36 Ark. 41; *Callaghan v. Bean*, 9 Allen, 401; *Glassey v. Railroad Co.*, 57 Pa. St. 172; *Jeffersonville etc. R. R. Co. v. Bowen*, 40 Ind. 545; *Casey v. Smith*, 152 Mass. 294; 23 Am. St. Rep. 842; *Evansville etc. R. R. Co. v. Wolf*,

59 Ind. 89.) The verdict is excessive, being so disproportioned to the injury produced as to show that the jury must have acted through passion or prejudice. (*Morgan v. Southern Pac. Co.*, 95 Cal. 510, 519; 29 Am. St. Rep. 143; *Wheaton v. North Beach etc. R. R. Co.*, 36 Cal. 591; *Kinsey v. Wallace*, 36 Cal. 462, 480; *Tarbell v. Central Pac. R. R. Co.*, 34 Cal. 616, 623; *Aldrich v. Palmer*, 24 Cal. 513; *McCarty v. Fremont*, 23 Cal. 196; *Russell v. Dennison*, 45 Cal. 337; 50 Cal. 243; *Phelps v. Cogswell*, 70 Cal. 201; *Vicksburg v. McLain*, 67 Miss. 4; *Potter v. Chicago etc. R. R. Co.*, 22 Wis. 615; *Gunderson v. Northwestern Elevator Co.*, 47 Minn. 161; *Strutzel v. St. Paul etc. Ry. Co.*, 47 Minn. 543.) The evidence was not sufficient to show negligence of the defendant, which cannot be presumed from the fact of injury, and there is no substantial proof of want of ordinary care. (*Roller v. Sutter Street R. R. Co.*, 66 Cal. 230; *Bailey v. Market Street etc. Ry. Co.*, *supra*; Booth on Street Railway Law, sec. 323; *Maschik v. St. Louis etc. Ry. Co.*, 71 Mo. 276; *Fenton v. Railway Co.*, 126 N. Y. 625; *Citizens' Street Ry. Co. v. Cary*, 56 Ind. 396; *Chrystal v. Troy etc. R. R. Co.*, 105 N. Y. 164.) There was no substantial conflict in the evidence. (*Driecoll v. Market Street etc. Ry. Co.*, 97 Cal. 553, 562, 563; 33 Am. St. Rep. 203.)

Frederick E. Whitney, and M. C. Chapman, for Respondent.

Though there is conflict in the authorities, the weight of reason and authority is in favor of the position that a parent of limited means, who cannot maintain help in the care of his child, and has no playground for it, is only responsible for ordinary care, under the circumstances in which he is placed, while ordinary care, in a person of more means, might require greater safeguards. (*Hedin v. City etc. Ry. Co.*, 26 Or. 155; *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 277; *Pittsburgh etc. R. R. Co. v. Pearson*, 72 Pa. St. 169; *Philadelphia etc. R. R. Co. v. Long*, 75 Pa. St. 257; *Winters v. Kansas City etc. Ry. Co.*, 99 Mo. 520; 17 Am. St. Rep. 591; *Walters v. Chicago etc. R. R. Co.*, 41 Iowa, 71, 78; Beach on Contributory Negligence, sec. 135, p. 172.) The question of contributory negligence, under the circumstances of this case, was one of fact for the jury. (*Hedin v. City etc. Ry. Co.*, *supra*; *Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 447, 454; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 507;

Kunz v. Troy, 104 N. Y. 344, 352; 58 Am. Rep. 508; *Morgan v. Illinois etc. Bridge Co.*, 5 Dill. 96; *Weissner v. St. Paul etc. Ry. Co.*, 47 Minn. 468, 471; *Weil v. Dry Dock etc. Ry. Co.*, 119 N. Y. 147, 152; *Houston City etc. Ry. Co. v. Dillon*, 3 Tex. Civ. App. 303; *Baker v. Flint etc. R. R. Co.*, 91 Mich. 298, 307, 308; 30 Am. St. Rep. 471.) If plaintiff was negligent in permitting the child to be upon the street, yet, under the facts, it being possible to stop the car in time to avoid the injury, defendant is liable, ordinary negligence in case of an adult being gross negligence in case of an infant. (*Schierhold v. North Beach etc. R. R. Co.*, *supra*; *Walters v. Chicago etc. R. R. Co.*, *supra*; *Little Rock etc. Ry. Co. v. Barker*, 39 Ark. 491; *Indianapolis etc. Ry. Co. v. Pitzer*, 109 Ind. 179; 58 Am. Rep. 387; *Farris v. Cass Avenue etc. Ry. Co.*, 80 Mo. 325, 328; *Schwier v. New York etc. R. R. Co.*, 90 N. Y. 558.) A railroad company is liable for gross negligence notwithstanding the existence of contributory negligence. (*Esrey v. Southern Pac. Co.*, 103 Cal. 541; *Meeks v. Southern Pac. R. R. Co.*, 56 Cal. 513; 38 Am. Rep. 67, 70; *Frazer v. Railroad Co.*, 81 Ala. 185; *Becker v. Cincinnati St. Ry. Co.*, 2 Ohio Dec. 137; *Winters v. Kansas City R. R. Co.*, 99 Mo. 509, 520; 17 Am. St. Rep. 591.) The denial of the motion to compel an election is not reviewable upon appeal. (*People v. Briggs*, 114 N. Y. 56; *Brady v. Ludlow Mfg. Co.*, 154 Mass. 468.) No special damages were necessary to be averred in this case, and the complaint supports the general verdict. (*Morgan v. Southern Pac. Co.*, 95 Cal. 510, 520; 29 Am. St. Rep. 143; *Gebbie v. Mooney*, 121 Ill. 255; *Schultz v. Third Avenue R. R. Co.*, 89 N. Y. 242, 246, 247.) An objection of uncertainty in pleading cannot be raised for the first time on appeal. (*Seligman v. Armando*, 94 Cal. 314.) The question of credibility of witnesses and probability of their evidence is for the jury. (*Morgan v. Southern Pac. Co.*, *supra*.) The verdict was not excessive. The jury had discretion as to the amount of damages, and no absolute standard can be fixed. (*Redfield v. Oakland etc. Ry. Co.*, 110 Cal. 277, 285, 286; *Howland v. Oakland etc. Ry. Co.*, 110 Cal. 513; *Lake Erie etc. Ry. Co. v. Acres*, 108 Ind. 548; *Louisville etc. Ry. Co. v. Pedigo*, 108 Ind. 481; *Louisville etc. Ry. Co. v. Falvey*, 104 Ind. 409; *Louisville etc. Ry. Co. v. Wbod*, 113 Ind. 544.)

VAN FLEET, J.—Action by the [father] to recover damages resulting from the [death of his infant son] alleged to have been caused by the negligence of defendant in running over him with one of its electric cars.

Judgment was for plaintiff, and defendant appeals therefrom and from an order denying it a new trial.

1. Appellant devotes a considerable portion of its brief in an effort to convince us that the evidence fails to show any negligence on the part of defendant. The task has proven fruitless. An examination of the evidence discloses a substantial conflict upon that issue, however much it may be said to preponderate in defendant's favor. Much of counsel's argument in this behalf is expended in endeavoring to demonstrate that the two witnesses whose testimony tends to create the conflict were wholly unworthy of credence, and that therefore the evidence, while apparently conflicting, is not so in substance. But the credibility of witnesses is a question for the jury, so long as the testimony which they give has a legal tendency to establish the fact, and where, as here, there is nothing so inherently or otherwise manifestly improbable in its character as to justify the court in ignoring it.

2. Appellant also contends that under the evidence the plaintiff was shown to have been guilty of contributory negligence in permitting his child to expose himself unattended and unprotected to the dangers of the street, and that that issue should have been withheld from the jury.

The evidence upon this question was in substance this: Plaintiff's dwelling fronted on Tenth street, in the city of Oakland, about one hundred feet from Franklin street, along which ran defendant's railway; his family consisted, at the time, of his wife, a daughter of about thirteen years, and the boy that was killed, aged four and one-half years. The father worked at his trade, and was away from home during the day; the daughter attended school, the little boy remaining at home with his mother, who did her own work. The boy was permitted to play on the sidewalk, there being no front yard, and sometimes with other boys on Tenth street in front of the dwelling, but he had been repeatedly admonished by his parents not to go to Franklin street where the cars ran, because they knew it was dangerous, and he

was not permitted to go there with their knowledge; he was an ordinarily obedient child, and generally, as admonished, played near his home, but would at times stray onto Franklin street without his mother's knowledge; on such occasions, when she discovered the fact, she would either go or send after him. Her daughter, when at home, generally looked after the boy, but when at school the mother had his sole care. To quote from the latter's testimony: "Of course I couldn't watch him every minute; he could open the door and go out, but he was generally a very good child to mind—better than the average child. I tried to keep him in the best I could, anyway. It was not very often that I had occasion to call him away from Franklin street. If he was not in front of the house I would have some one go after him, or go after him myself and bring him back. He very seldom went away when I told him not to go."

On the occasion of the accident the mother was engaged in doing some washing on the back porch of the house. She testified: "I did not know for certain that the little boy was in the street at that time. He came in fifteen or twenty minutes before he was killed, and I told him not to go away. Then I went right on with my washing. I supposed he was in the house. I didn't go right to see, just exactly right away. . . . There was no one in the house at the time the little boy came in, and I told him not to go out. The little girl, thirteen years old, at the time was helping me on the porch washing. I did not see the accident. There was no servant employed by myself or husband about the premises. The little boy was in the house about fifteen or twenty minutes before he was killed." The boy had gone to Franklin street, got on the defendant's railway in front of an advancing car, and was run over and killed.

This evidence is practically without controversy, and defendant's claim is that it establishes negligence per se which should preclude recovery.

If the term "negligence" signified an absolute quantity or thing to be measured in all cases in accordance with some precise standard, much of the difficulty which besets courts in the solution of this class of cases would be at once dissipated. But, unfortunately, it does not. Negligence is not absolute, but is a thing which is always relative to the particular circumstances of which

it is sought to be predicated. For this reason it is very rare that a set of circumstances is presented which enables a court to say as a matter of law that negligence has been shown. As a very general rule, it is a question of fact for the jury—an inference to be deduced from the circumstances; and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. The fact that the evidence may be without conflict is not controlling, nor even necessarily material. Conceded facts may as readily afford a difference of opinion as to the inferences and conclusions to be drawn therefrom as those which rest upon conflicting evidence; and, if there be room for such difference, the question must be left to the jury. (Beach on Contributory Negligence, sec. 163; *Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 447, 453; *Van Praag v. Gale*, 107 Cal. 438.)

Within these principles the evidence in this case cannot be said to establish negligence per se. Parents are chargeable with the exercise of ordinary care in the protection of their minor children; and whether the conduct of the mother, for which plaintiff is to be held responsible, in permitting the deceased child to be out of her sight for a period of from fifteen to twenty minutes, without satisfying herself of his whereabouts, was, under all the circumstances, a want of ordinary care, was, we think, a fairly debatable question. (*Schierhold v. North Beach etc. R. R. Co.*, *supra*; *Meeks v. Southern Pac. R. R. Co.*, 56 Cal. 513; 38 Am. Rep. 67; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504.)

But, were defendant's contention sustainable in this respect, it would not necessarily determine the plaintiff's right to recover. There was evidence tending to show that when the child went upon the railway track he was a sufficient distance in advance of the approaching car to have enabled those in charge thereof, by the exercise of ordinary care, to have stopped before striking him.

This evidence, if believed by the jury, and their verdict implies that it was, would tend to show gross negligence on the part of defendant's servants, and justify a finding for plaintiff notwithstanding the negligence of the parents in permitting the child to be in the street. This is upon the principle, now firmly established in this state, that a party having an opportunity by the exercise of proper care to avoid injuring another must do so,

notwithstanding the latter has placed himself in the situation of danger by his own negligence or wrong. (*Schierhold v. North Beach etc. R. R. Co.*, *supra*; *Needham v. San Francisco etc. R. R. Co.*, 37 Cal. 409; *Meeks v. Southern Pac. R. R. Co.*, *supra*; *Esrey v. Southern Pac. R. R. Co.*, 103 Cal. 541, 544; *Cunningham v. Los Angeles Ry. Co.*, 115 Cal. 561.)

3. Defendant complains of the action of the court in another respect affecting its defense of contributory negligence.

The court, against defendant's objection, permitted plaintiff to testify that he had no servants, and was too poor to employ any; and in submitting the case to the jury charged them that "the fact that plaintiff is a poor man, if that be true, constitutes no ground why he is entitled to a verdict, but is a matter to be considered by you in determining whether or not he has been guilty of contributory negligence." This action of the court is assigned as error, in that it submitted to the jury an element having no competent bearing upon the issue.

The question whether the poverty of the parents can be considered by the jury in such a case in determining the question of their negligence is one which has given rise to some contrariety of expression, both from courts and law-writers; but we think the better reasoning decidedly against its consideration. We are unable to perceive wherein the fact that a parent may or may not have the means to employ servants to look after his young children can have any relevant or competent bearing upon the question whether in any instance he has given them that degree of care which the law requires at his hands. Care, like its correlative negligence, is a relative term, and is to be judged by the circumstances as they exist, not as they might have existed under other and different conditions; and the question, therefore, is, What, under the facts actually surrounding him at the time, and of which he had knowledge, could reasonably be demanded of the parent? This is a question which cannot be affected by a consideration of what he could or should have done under other circumstances. As suggested by the supreme court of Indiana in *Mayhew v. Burns*, 103 Ind. 339, 340, in holding the inadmissibility of such evidence: "Whether one was negligent or not in a given case must be determined by considering his or her conduct as it related to the particular circumstances of the occasion or affair out of which the case arises."

"It cannot be solved by showing their general pecuniary condition. Their ability to act, and what they did or omitted to do, with reference to the particular emergency, is all that is important. All that was necessary for the plaintiff to show in this case was the actual situation of his household, and that neither he nor those whom he had intrusted with his child were guilty of any act or omission in relation to the child and the excavation into which it fell. This was a question of conduct, not of property. The ability to comprehend and guard against the danger when comprehended, and the acts and omissions of the plaintiff and his housekeeper after the facts were known, were all the subjects material to the inquiry. His duty as it related to his child and the sources of danger were the same whether his household was managed as it was from choice or necessity. It would be monstrous to assume that the care or solicitude of a parent for the safety of a child in respect of danger to its person had any relation to his pecuniary condition."

And again by the same court in the later case of *Indianapolis etc. Ry. Co. v. Pitzer*, 109 Ind. 179, 190, 58 Am. Rep. 387, the doctrine is reaffirmed, and it is further suggested: "Any other rule would be impracticable as well as unsound in principle. If the pecuniary condition of the parent is accepted as the standard, all is uncertain, for no definite amount of pecuniary means can be taken as a guide, since it would be impossible to determine what a parent should be worth in order to impose upon him the duty of employing nurses or attendants for his children."

Judge Dillon, having occasion to consider this question, expresses his views thereon in this terse fashion:

"Some of the cases seem to make the liability depend upon the means of the parents, and to countenance a distinction as to contributory negligence between parents able to employ nurses or attendants, and those who are not. This distinction may be doubted, for there is not in this country one rule of law for the rich and a different rule for the poor. It extends its protecting shield over all alike." (*Hagan's Petition*, 5 Dill. 96.)

And this court, in the very recent case of *Cunningham v. Los Angeles Ry. Co.*, *supra*, in considering an instruction bearing upon the same question, took occasion to say: "We think the court should have refrained from charging that the law does not require parents to keep an attendant with their young children; and that

they are not required to shut them up. While, abstractly speaking, these things are perfectly true, the question of whether such precautions are necessary under any given circumstances to constitute ordinary care for the safety of their children with which parents are charged, is one of fact for the jury, and not for the court to determine as matter of law."

The opposite doctrine would seem to have been largely built up from observations made by judges in discussing the general subject of the contributory negligence of parents in cases where the question of their pecuniary condition was not directly involved. In none of the cases cited by respondent does the question appear to have arisen upon the evidence or instructions, but was suggested in the course of reasoning pursued by the appellate court. Mr. Beach (Beach on Contributory Negligence, sec. 135) takes this side of the controversy; but the cases to which he refers are the same, with the exception of a recent one of the same type from Oregon (*Hedin v. City etc. Ry. Co.*, 26 Or. 155), to which we are referred by respondent. Criticising these cases referred to by Beach, Mr. Patterson (Patterson's Railway Accident Law, sec. 81) says: "It has been held that poor parents of infant children are not contributorily negligent if they do not prevent their infant children from straying into the public streets or upon the lines of highways. The judgments in those cases seem to have been largely influenced by the sentimental reflections of the judges upon the poverty of the plaintiffs, and their consequent inability to employ servants to watch their children, and the hardship of requiring them to keep those children within doors when they could not safely go abroad; but those learned judges failed to give due weight to the consideration that the railway was not responsible for the acts of the parents in bringing the children into the world, nor for that degree of misfortune which retained those parents in a condition of more or less want, and that there is no rule of law nor principle of justice which compels railways to insure the public against the necessary incidents of poverty, nor which entitles people, either poor or rich, to make at the expense of railways profitable speculations out of the deaths of the children whom their own neglect of parental duty has exposed to peril."

In *Mayhew v. Burns*, *supra*, referring to this same line of cases,

it is said: "The cases relied on are cases where children escaped from the observation of persons in whose care they were left, and sustained injury by going on railway tracks. It is said in most of these cases that parents who are poor frequently find it necessary, while engaged by their duties, to leave their younger children in the custody of older sisters or brothers, who have attained to sufficient age and intelligence to guard them from danger, and that negligence should not be imputed to them if they escape their oversight and sustain injury. We should have no difficulty in saying as much, regardless of the pecuniary condition of the parents. We can conceive of no attendant who would be more solicitous for the welfare of an infant than its older sister or brother, who was of sufficient age and intelligence to be left as its guardian. It is idle to say that the propriety or impropriety of so leaving an infant is to be determined by an inquiry concerning the amount of property the parent owns. . . . We can discover no principle upon which it can be determined whether negligence can be attributed to one in a given case by an inquiry into the state of his fortune."

After a careful review of the authorities we are clearly of the opinion that the question of the parent's negligence in any given case cannot be made to turn upon the state of his finances, and that the rulings of the court below in this respect were erroneous.

Plaintiff contends that, if wrong, the rulings did not constitute prejudicial error for the reason, suggested above, that there was evidence entitling plaintiff to recover notwithstanding any question of contributory negligence. Whether that be true or not we need not decide, since there must be a new trial upon another ground.

4. It is claimed that the verdict was so excessive as to show passion or prejudice by the jury in its verdict, and this contention must be sustained.

There was no averment or evidence of peculiar or special damages, nor of a right to exemplary or punitive damages, the plaintiff's cause of action resting solely upon his right to recover for the loss of the services of his child resulting from its death. The evidence simply tended to show that the boy was four and a half years old; was an ordinarily bright, healthy, affectionate, and obedient child; with an expectancy of life which, if realized, would have carried him considerably beyond the age of majority.

The jury were properly instructed that they could award nothing in the way of penalty for his death, nor for sorrow or grief of his parents, but must confine their verdict to an amount which would justly compensate plaintiff for "the probable value of the services of the deceased until he had attained his majority, taking into consideration the cost of his support and maintenance during the early and helpless part of his life"; that while they could consider the fact that plaintiff had been deprived of the comfort, society, and protection of his son, this consideration could only go to affect the pecuniary value of his services to plaintiff.

Upon the evidence and these instructions the jury gave a verdict for six thousand dollars.

We think it quite manifest, upon its face, that the verdict was actuated by something other than a consideration of the evidence. Under no conceivable method or rule of compensation permissible under the evidence could such a result have been attained. There was nothing to indicate that the value of the child's services would have been greater than that of the ordinary boy of his age, assuming that such a fact would have been pertinent. He was a mere infant, and for many years at best, under ordinary conditions—and it is by such we must judge—he would have remained, however dear to their hearts, a subject of expense and outlay to his parents, without the ability to render pecuniary return. And common experience teaches further that, even after reaching an age of some usefulness, he yet would continue for the better part of his remaining years of minority more a source of outgo than of income. When we regard the probable number of years to be taken in his schooling, in this day of general desire and necessity for education and knowledge, comparatively little valuable time would be left to be devoted to the service of the parent.

But assuming that the deceased would have been set to useful and valuable employment of some appropriate character as early as ten years of age, which is unusual, at no average rate of income or wages which he could reasonably have earned would it be at all probable that in the time intervening his majority he could have earned, over and above the cost and expense of his maintenance, the very large sum given by the verdict.

Under the circumstances of the case it is solely by the probabilities that these things can be estimated. And while in no sense conclusive, we have the right, and it is most reasonable in judging of the probable character of occupation the deceased would have pursued, to regard, with the other circumstances surrounding him, the calling of his father—since experience teaches that children do very frequently pursue the same general class of business as that of their parents. (*Walters v. Chicago etc. R. R. Co.*, 41 Iowa, 71, 73.)

From these considerations we think it obvious, as contended, that the verdict was prompted by improper motives on the part of the jury. While it is the province of the latter to estimate the extent of the injury, the right is not arbitrary, but must be justly exercised within the evidence. And when it is apparent that the award "is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury," it will be set aside. (*Morgan v. Southern Pac. Co.*, 95 Cal. 510; 29 Am. St. Rep. 143; *Tarbell v. Central Pac. R. R. Co.*, 34 Cal. 623; *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 687; *St. Louis etc. Ry. Co. v. Robbins*, 57 Ark. 377; *Chicago etc. Ry. Co. v. Bayfield*, 37 Mich. 205, 215; *Potter v. Railroad Co.*, 22 Wis. 615.)

5. The remaining points call for no extended notice.

We discover no material error in the refusal of the court to require plaintiff to elect upon which of the two separate averments of damage he would rely. They were not properly the subjects for separate averment, the loss of society, comfort, etc., being but an element in estimating the value of services. The objection to the manner of pleading might perhaps have been reached by a demurrer for uncertainty or ambiguity.

The instruction refused on the subject of exemplary or punitive damages was, we think, substantially covered in the charge of the court; the other instruction refused did not correctly state the law.

The judgment and order are reversed and the cause remanded for a new trial.

Harrison, J., and Beatty, C. J., concurred.

Hearing in Bank denied.

[S. F. No. 898. Department One.—September 8, 1897.]

In the Matter of the Estate of JEREMIAH O'CONNOR, Deceased.

EVIDENCE—IMPEACHMENT OF WITNESS—INCONSISTENT STATEMENTS.—To impeach a witness upon the ground of inconsistent statements, the impeaching testimony must be plainly inconsistent with that already given.

ID.—CONTEST OF WILL—TIME OF STROKE OF APOPLEXY—STATEMENT OF ANSWER NOT INCONSISTENT WITH EVIDENCE.—Where the executor, upon the contest of a will, testified upon cross-examination that the deceased was not suffering from a stroke of apoplexy at the time when the will was made, a statement in his original answer to the contest that the deceased was attacked by a stroke of apoplexy at about the hour of 10 A. M. on the day on which the will was executed, is not admissible for the purpose of impeachment, it not appearing whether the will was executed before or after the stroke of apoplexy, or that the statement of the answer related to the time when the will was made, so as to be plainly inconsistent with the evidence given.

ID.—USE OF ORIGINAL ANSWER FOR IMPEACHMENT—EFFECT OF AMENDED ANSWER.—The fact that the original answer is superseded by an amended answer as a pleading furnishes no valid ground for rejecting proof of its statements for purposes of impeachment, when they are plainly contradictory of evidence given by the party who verified the original answer.

ID.—EXCLUSION OF PHYSICIAN'S CERTIFICATE AS TO CAUSE OF DEATH—APPEAL—EVIDENCE NOT IN RECORD—INJURY NOT SHOWN.—If the certificate of the attending physician showing that the death of the deceased was caused by apoplexy is to be regarded as competent evidence of that fact in favor of the contestant of the will of the deceased, under section 1920 of the Code of Civil Procedure, yet, where the evidence given upon the trial of the contest is not embodied in the record upon an appeal taken by the contestant, and it does not appear that the will was not made prior to the stroke of apoplexy, the appellant does not fulfill his duty of showing that substantial injury resulted from the ruling of the court, and does not show that the offered evidence was at all material.

APPEAL from an order of the Superior Court of the City and County of San Francisco admitting a will to probate. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

H. W. Hutton, for Appellant.

The court erred in excluding the certified copy of the certificate of death. (Pol. Code, secs. 3023-25; Code Civ. Proc., sec.

1920; *Swamp Land Dist. v. Gwynn*, 70 Cal. 566; *People v. Grundell*, 75 Cal. 303; *Reclamation Dist. v. Wilcox*, 75 Cal. 448; *People v. Fairfield*, 90 Cal. 186.) The court erred in refusing to allow the executor to be cross-examined in reference to the original answer. (*Johnson v. Powers*, 65 Cal. 180; *Collins v. Scott*, 100 Cal. 453.) Exclusion of proper testimony is always ground for reversal. (*Jolley v. Foltz*, 34 Cal. 321; *Estate of Toomey*, 54 Cal. 517; 35 Am. Rep. 83; *In re Carpenter*, 79 Cal. 386.)

Wheaton, Kalloch & Kierce, and Stephen L. Sullivan, for Respondents.

No prejudice or injury appears from any ruling of the court, and the judgment must therefore be affirmed. (*Mechem v. McKay*, 37 Cal. 165; *Ponce v. McElvey*, 51 Cal. 223; *Morris v. Lachman*, 68 Cal. 112; *Stern v. Loewenthal*, 77 Cal. 343.) There is now no presumption that error is prejudicial. (Code Civ. Proc., sec. 475, in effect February 26, 1897.)

GAROUTTE, J.—The present action arises upon a contest of the probate of a will. The contestant appeals, and we find but two questions disclosed by the record demanding special consideration. One Behan was named as executor, and signed and verified the original answer to the contestant's pleading. This answer was subsequently superseded by an amended answer. In the original answer Behan admitted that at about the hour of 10 A. M., July 17, 1896, "said decedent [O'Connor] was attacked by a stroke of apoplexy." The will was made upon the same day, but the particular hour is not shown by the record. At the trial Behan testified that the deceased was of sound and disposing mind at the time he made the will. Upon cross-examination he testified that the deceased was not suffering from a stroke of apoplexy at the time the will was made. For the purpose of impeaching the credibility of the witness the contestant offered the aforesaid admission taken from the original answer of Behan. Under objection this evidence was ruled out, and this ruling is now assigned as error. We are satisfied that the trial court was clearly right. To impeach a witness upon the ground of inconsistent statements, the impeaching testimony must be plainly inconsistent with that already given. Behan in the pleading

stated the decedent's physical condition at about 10 A. M., July 17th. In his testimony he stated his physical condition at the time he made the will. That time may have been many hours after 10 A. M. Indeed, it may have been before 10 A. M. The evidence of the witness upon the stand was directed to the condition of the deceased at a particular time, and the impeaching evidence to be admissible should have been directed to the same time. It may be further suggested that the fact of the pleading being superseded by another furnished no valid ground for rejecting the admissions therein contained when offered for impeachment purposes. The statements of fact therein made by the party stood exactly as though found in any other written document made by him, and were entitled to be used against him for impeachment purposes, if they were such as to serve that purpose. (See *Johnson v. Powers*, 65 Cal. 179.)

Contestant attempted to introduce in evidence the death certificate furnished by the attending physician to the health officer, for the purpose of showing that the cause of death was apoplexy. This offered evidence was rejected. Conceding the certificate to be competent evidence by virtue of the provisions of section 1920 of the Code of Civil Procedure relating to public records, still we fail to see how contestant was prejudiced by the ruling. The evidence given at the trial is not before us. There is nothing in the record to show the materiality of such evidence as that proposed to be offered. It is for the appellant to show substantial injury by the ruling of the court, and here it is not shown. Apoplexy, as a rule, comes without warning. In no sense is it considered a slow and insidious disease; and it is impossible to say by the record that this attack came upon deceased prior to the making of the will. If the shock of apoplexy which caused his death—conceding such to be the cause of his death—fell upon him after the will was made, then certainly the fact that he died from the effects of such shock was entirely immaterial to the investigation then before the court. We see nothing further in the record demanding consideration.

For the foregoing reasons the judgment is affirmed.

Harrison, J., and Van Fleet, J., concurred.

[S. F. No. 939. Department One.—September 8, 1897.]

In the Matter of the Estate of NANNIE E. LESLIE, Deceased.

ESTATES OF DECEASED PERSONS—SEPARATE ESTATE OF DECEASED WIFE—ORDER SETTING APART TO MINOR CHILDREN—CONSTRUCTION OF CODE.—
Section 1469 of the Code of Civil Procedure, providing that an estate in value not exceeding fifteen hundred dollars shall be set apart for the use of the minor children, if there be no widow, applies to the separate estate of a deceased wife, and covers all property where the estate does not exceed in value that sum, whether the property be community or separate.

APPEAL from an order of the Superior Court of the City and County of San Francisco, assigning the whole separate estate of a deceased wife, appraised at eleven hundred and twenty-five dollars and thirty-five cents to the minor children, to the exclusion of the husband. Charles W. Slack, Judge.

The appeal was taken by the husband of the deceased wife. The facts are stated in the opinion of the court.

William J. Herrin, for Appellant.

The legislature had in view only community property, in the provision for setting apart an estate of small value, a widower not being mentioned, because the entire community property vests in him upon death of the wife. (Code Civ. Proc., sec. 1469.) But the provision for the support of the "family" should apply, if the section applies at all to this case; and the husband must be included as one of the family. (*Phelan v. Smith*, 100 Cal. 170.)

Albert C. Aiken, for Respondent.

The purpose of the statute was to save small estates from administration, and should be liberally construed to effect that purpose. (Notes of Code Commissioners, Code Civ. Proc., ed. 1872, sec. 1469.) The use of the word "family" does not give the husband a right in a small estate of the wife; as the husband is excluded by the subsequent specifications of "widow" and "minor children."

GAROUTTE, J.—In his brief appellant states that the sole question presented by this appeal is, Does section 1469 of the

Code of Civil Procedure apply to the separate estate of the wife? We see no reason why the provisions of that section do not apply to the separate property of both the wife and husband equally with the community property. The section is broad in its terms, and in no way is it there indicated that community property only was in the mind of the legislature when this law was enacted. It refers in terms to the estate of any deceased person. There is no more reason why a small separate estate of the deceased husband or wife should not be set apart to the minor children than there is why an estate of community property should not be set apart. The same object and purpose is subserved in both cases. The reasons for taking the estate out of administration, and setting it aside to the minor children, are the same whatever may be the technical character of the property belonging to the estate. We conclude that the statute covers all property, whether community or separate.

Judgment affirmed.

Harrison, J., and Van Fleet, J., concurred.

[S. F. No. 716. Department One.—September 8, 1897.]

In the Matter of the Guardianship of the Person and Estate of
D. B. CARVER, Jr., a Minor.

GUARDIAN AND WARD—INVESTMENT BY GUARDIAN WITHOUT AUTHORITY OF COURT—LOANS UPON INADEQUATE SECURITY—REJECTION OF LOANS AS ASSETS.—A guardian, by securing the consent of the court, may invest the ward's estate without risk to himself; but where he fails to do so, and assumes to act upon his own responsibility, he is held to a strict accountability; and where loans are made without the advice and consent of the court upon inadequate security, and were not such as a prudent business man would have made, the court may properly reject such loans as assets of the estate.

APPEAL from an order of the Superior Court of Napa County, settling the final account of a guardian. E. D. Ham, Judge.

The facts are stated in the opinion of the court.

Driver & Sims, for Appellant.

Thomas Watt, and A. J. Hull, for Respondent.

GAROUTTE, J.—P. G. Riehl, as guardian of the person and estate of D. B. Carver, Jr., appeals from an order settling his final account. Upon the hearing of this account it appeared that the guardian had invested a large portion of the ward's estate in two loans secured by mortgage upon realty. These loans were made without the advice and consent of the court, and at the hearing of the account were rejected as assets of the estate. As to the acts of the guardian pertaining to these loans, the court found as a fact that they were made upon inadequate security, and were not such as a prudent business man would have made. Upon an examination of the evidence we are satisfied with this finding. There is no good reason presented why the court should disturb it. The guardian did not exercise that care in the management of his ward's estate which the law demands by reason of the trust relation that he assumed. By securing the consent of the court he could have invested the ward's estate without risk to himself. This he failed to do, but assumed to act upon his own responsibility. Under such circumstances he is held to a strict accountability. (See *Guardianship of Cardwell*, 55 Cal. 137.)

The order is affirmed.

Harrison, J., and Van Fleet, J., concurred.

[Crim. No. 145. In Bank.—September 8, 1897.]

THE PEOPLE, Respondent, v. LOUIS COHEN, Appellant.

CRIMINAL LAW—PERJURY—AUTHORITY TO ADMINISTER OATH ESSENTIAL.—In order to constitute the offense of perjury, it is essential that the violated oath shall appear to have been administered by competent authority, and it is not sufficient that the officer may have had general power to administer oaths, but it must appear that he possessed authority to administer the oath in the particular proceeding involved; and however false the oath may be, the person making it cannot be convicted of perjury, unless the officer who administered the oath had legal authority to administer it.

ID.—AUTHORITY OF SUPERIOR JUDGE SITTING AS MAGISTRATE.—A superior judge, when sitting as a magistrate, possesses no other or greater powers than are possessed by any other officer exercising the functions of a magistrate, and has no greater authority as such magistrate than that possessed by any justice of the peace, or police judge, and is not accompanied in the discharge of those functions by any general or implied powers, nor by any of those presumptions of regularity which surround him when sitting as a judge of a court of record; and he has no more authority to call in the county clerk or other officer to administer oaths before him than a justice of the peace or police judge would possess.

ID.—AUTHORITY STATUTORY—DELEGATION OF POWER—IMPLICATION AS TO OATH BEFORE MAGISTRATE.—The authority of a judge sitting as a magistrate is purely that given by the statute; and while there is no express provision of the statute requiring the witnesses before a magistrate to be sworn by him personally, neither is there any such giving him power to delegate that duty to another; and, the power being statutory, the implication would be that it was intended that the oath should be administered by the magistrate.

ID.—DIRECTION TO ADMINISTER OATH—PLEADING—INSUFFICIENT INDICTMENT. Assuming that the magistrate may competently direct a clerk or other officer to administer oaths in his presence for him, it must be specifically alleged in the indictment or information that the oath was administered at the direction of the magistrate; and an averment that "a duly appointed, qualified, and acting deputy county clerk of the city and county of San Francisco, an officer authorized by law to administer oaths, and to administer an oath to said Louis Cohen," etc., administered the same, is but the averment of a legal conclusion that, being a deputy clerk, the officer was so authorized, and is not an averment that he was so authorized or directed by the magistrate; and the indictment is insufficient to show that any valid oath was administered to the defendant.

ID.—CONSTRUCTION OF CODE—OATH ADMINISTERED IRREGULARLY.—Section 121 of the Penal Code, which provides that "it is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner," has reference to some mere informality in the substance of the oath as administered before the officer having authority to administer it, and does not excuse the necessity of an oath in substantial form administered by a person of competent authority.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William T. Wallace, Judge.

The facts are stated in the opinion of the court.

T. J. Crowley, and H. I. Kowalsky, for Appellant.

It is essential that the oath be taken before an officer having authority to administer it, in the particular case. (Roscoe's Criminal Evidence, 11th ed., 791; Russell on Crimes, 5th ed., 5; 2 Wharton's Criminal Law, 1263; *Van Dusen v. People*, 78 Ill. 645; *Biggerstaff v. Commonwealth*, 11 Bush, 169.) The indictment must show that the officer had authority to administer the oath. (*State v. Dayton*, 23 N. J. L. 49; 53 Am. Dec. 270.) A magistrate is not a court. (Pen. Code, sec. 807.)

W. F. Fitzgerald, Attorney General, and W. H. Anderson, Assistant Attorney General, for Respondent.

The county clerk has general authority to administer oaths. (Code Civ. Proc., sec. 2093.) The administration of an oath is a ministerial act, and when administered by the clerk in the presence of the judge, is regarded in law as administered by the judge. (2 Wharton's Criminal Law, sec. 1315; *Oaks v. Rodgers*, 49 Cal. 197; *Stephens v. State*, 1 Swan, 157-59; *Ayrs v. State*, 5 Cold. 31, 32; *Staight v. State*, 39 Ohio St. 496, 498; *Walker v. State*, 107 Ala. 5, 10.) It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner. (Pen. Code, sec. 121.)

VAN FLEET, J.—Defendant was convicted of perjury, alleged to have been committed in testifying falsely on the preliminary examination of one Louis Sternberg on a charge of false registration. He appeals from the judgment and from an order denying him a new trial.

The cause was first submitted here in Department, but without briefs by either party, and upon an oral argument which did not enable the court to reach a conclusion. The case having been thereupon ordered to a hearing in Bank, briefs have since been filed, and a more satisfactory presentation had of the questions involved.

The first point made by defendant is that the court erred in overruling his demurrer to the indictment. The demurrer was upon the ground, among others, that the indictment did not conform to the requirements of sections 950, 951, and 952 of the Penal Code, that it was not direct or certain as to the offense

charged, and that the facts did not constitute a public offense—the particular objection made under the demurrer being that it did not appear from the indictment that the officer by whom the alleged false oath was administered had authority to administer the same.

The allegations of the indictment material to the inquiry are in substance that defendant appeared as a witness before the Hon. William T. Wallace, a judge of the superior court of the city and county of San Francisco, “sitting as a magistrate in the examination of a certain charge then and there pending against one Louis Sternberg,” etc., stating the nature of such charge. “That thereupon one Joseph I. Twohig, a duly appointed, qualified, and acting deputy county clerk of the city and county of San Francisco, and an officer authorized by law to administer oaths, and to administer an oath to the said Louis Cohen, did then and there,” etc., “administer an oath in due form of law to said Louis Cohen.”

The proposition of defendant is that in a preliminary examination before a committing magistrate of one charged with crime, the statute makes no provision for the administration of the oath by other than the magistrate himself; that it gives the latter no authority to call in another officer to swear the witnesses before him, but contemplates and requires that the witnesses shall be sworn by the magistrate personally; that it is not made a part of the duty of the county clerk or his deputies to attend upon such magistrate, nor are they authorized to do so, or to administer oaths in such proceedings; and that the oath administered to defendant in this instance was therefore not a valid oath of which perjury may be competently predicated.

One of the primary elements requisite to constitute the offense of perjury is that the violated oath shall appear to have been administered by competent authority. The officer before whom the oath is taken must not only have jurisdiction in the proceeding, but the oath must be alleged and shown to have been administered by one having authority to administer it. And it is not sufficient that the officer may have had general power to administer oaths, but it must appear that he possessed authority to administer the oath in the particular proceeding involved. (2 Wharton's Criminal Law, sec. 1262; *Biggerstaff v. Commonwealth*,

11 Bush, 169; 2 Roscoe's Criminal Evidence, *839; *State v. Jackson*, 36 Ohio St. 281; *Regina v. Stone*, Dears. C. C. 251; *State v. Powell*, 28 Tex. 630.)

However false an oath may be, one cannot be convicted of perjury except the officer who administers the oath have legal authority to administer it. (*Van Duzen v. People*, 78 Ill. 645, and authorities above cited.)

While conceding this requirement, the attorney general insists that it is met by the allegations of the indictment. His contention is, first, that a superior judge sitting as a committing magistrate, retains and possesses as such all the powers and attributes possessed by him as a judge of the superior court, with the same general right to require and have the attendance and services of the county clerk as when holding a superior court or transacting judicial business at chambers, and that, consequently, it was just as competent for the clerk to appear and swear the defendant as though the proceeding had been one before the superior court.

This position is untenable. A superior judge, when sitting as a magistrate, possesses no other or greater powers than are possessed by any other officer exercising the functions of a magistrate. The justices of this court, judges of the superior courts, justices of the peace and police magistrates in cities and towns are each and all by the statute made magistrates. (Pen. Code, sec. 808.) The office is purely a statutory one, and the powers and duties of the functionary are solely those given by the statute; and those powers are precisely the same whether exercised by virtue of one office, or that of another. The statute makes no sort of distinction between them. If a judge of a superior court, or a justice of this court, sees fit to assume the duties of a committing magistrate—duties which are usually performed by others—he has no greater authority as such magistrate than that possessed by any justice of the peace or police judge. (*People v. Crespi*, 115 Cal. 50.) He is not accompanied in the discharge of those functions by any of the general or implied powers, nor by those presumptions of regularity of his proceedings, which surround him when sitting as a judge of a court of record. As such magistrate he is purely a creature of the statute.

While sitting as a magistrate, then, a judge of the superior court would have no more right to call in the county clerk or

any other officer to administer oaths before him than would a justice of the peace or police judge. Nor would the county clerk or his deputies, although generally authorized to administer oaths, have any more right to perform that function before such judge sitting as a magistrate than before a justice of the peace, nor could they be required to do so in the one instance more than the other.

But it is further contended that there is nothing in the statute which requires a magistrate to personally swear the witnesses before him, nor which expressly negatives his right to have the services of a clerk for that purpose, but that the statute would seem to contemplate that he may have such assistance; and that it was therefore competent for the magistrate in this instance to call in the deputy clerk to administer the oath to defendant. While there is no express provision of the statute requiring the witnesses before a magistrate to be sworn by him personally, neither is there any such giving him power to delegate that duty to another, and the power being purely statutory, the implication would be that it was intended that the oath should be administered by the magistrate. If he may call upon the county clerk to perform such service, he could as well call upon a notary public or any other officer authorized to administer oaths. But, assuming that the magistrate may competently employ a clerk or other officer to perform this function, it is obvious that it should, to show authority in such officer, be alleged that the act was done at the direction of the magistrate. There is no such averment here except it be by mere inference or legal conclusion, and that is not sufficient. The fact being material, it must be directly averred to satisfy the rules of pleading, even in a civil action, and, a fortiori, in a criminal pleading.

"Every fact and circumstance necessarily stated in an indictment must be laid positively; that is, the indictment must directly affirm that the defendant did so and so, or that such a fact happened under such and such circumstances. It cannot be stated by way of recital that whereas, etc., or the like. (Citations.)

"The want of a direct allegation of anything material in the description, substance, nature, or manner of the offense cannot be supplied by any intendment or implication whatever; and, therefore, in an indictment for murder the omission of the words 'ex

malitia praecogitata' is not supplied by the words 'felonice murdravit,' although the latter words imply them. (Citations.) So in an indictment for perjury it must appear that the defendant was regularly sworn. (*State v. Divoll*, 44 N. H. 140, 142. See, also, *People v. Howard*, 111 Cal. 655, 658.)

The averment "that thereupon one Joseph I. Twohig, a duly appointed, qualified, and acting deputy county clerk of the city and county of San Francisco, an officer authorized by law to administer oaths, and to administer an oath to said Louis Cohen," etc., is but the averment of the legal conclusion that, being a deputy clerk, the officer was so authorized. It is not an averment that he was so authorized or directed by the magistrate.

But it is said that, even if it be the contemplation of the statute that the oath shall be administered by the magistrate himself, nevertheless the act is purely a ministerial one, which, when performed in the presence and at the direction of the magistrate, is to be deemed to have been performed by him. This proposition involves a rule of evidence, not of pleading; and all of the cases cited by the attorney-general in its support are cases where the administration of the oath was sufficiently averred, but the question arose at the trial on the sufficiency of the evidence to sustain that averment. It may be that had the indictment alleged the administration of the oath to defendant by the magistrate, and at the trial the proof had developed that it was administered by another, but under the magistrate's direction, under the doctrine contended for, the evidence would be held sufficient to sustain a conviction; but here the allegation is that the oath was administered by an officer other than the magistrate, and there is no semblance of an averment that it was at his direction.

Finally, it is urged that it is not the policy of our law that one guilty of perjury should escape punishment by reason of any mere informality or irregularity in the administration of the oath, and section 121 of the Penal Code is referred to, which provides that "it is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner." Whatever the character of the "irregularity" or informality which would be obviated by this section, it was manifestly not intended to excuse the necessity of a valid oath. A reference to the note appended to that section in the original copy of the code by the

commissioners who framed it indicates that the irregularity referred to in the statute has reference to some mere informality in the substance of the oath, as administered by the officers—one of the citations being a case where the witness was sworn upon a copy of Watt's Psalms and Hymns, the book being supposed to be the Bible; and another class of cases is referred to where the person taking the oath evades some formality with the intent to escape its obligation. We are satisfied that the section does not excuse the necessity of an oath in substantial form administered by a person of competent authority.

From these considerations we are of opinion that the averments of the indictment were insufficient to show that any valid oath was administered to defendant, and that therefore it did not sufficiently allege the offense.

Numerous other exceptions and errors are assigned and relied upon by appellant, principally that there is a fatal variance between the averment and the proof as to the date of the alleged offense; that the proceedings before the committing magistrate were coram non judice and void, because the magistrate had before the date of the alleged offense lost jurisdiction in the premises; that the court committed prejudicial error in its rulings upon evidence, and in charging the jury as to matters of fact, and also in some other respects not necessary to specify. In the view we have taken of the point discussed, however, it will not be essential to notice these various assignments, since the objection to the sufficiency of the indictment presents a fatal obstacle to the maintenance of the judgment, and being fundamental demands a reversal of the judgment, and renders a consideration of the other questions immaterial at this time.

The judgment and order are reversed and cause remanded, with directions to sustain the demurrer.

McFarland, J., Garoutte, J., Henshaw, J., Temple, J., and Harrison, J., concurred.

[S. F. No. 522. Department One.—September 10, 1897.]

PIERRE CAUHAPE, Administrator, etc., Appellant, v. SECURITY SAVINGS BANK et al., Respondents.

ORDER GRANTING NEW TRIAL—DISCRETION—INSUFFICIENCY OF EVIDENCE—INFERENCES OF FACT FROM UNCONTRADICTED EVIDENCE—REVIEW UPON APPEAL.—Where the grounds of a motion for a new trial include the insufficiency of the evidence to justify the decision, the appellate court cannot interfere with the discretion of the trial court to set aside the findings and to grant a new trial for such insufficiency, although the only conflict in the evidence consists of doubtful inferences of ultimate facts to be deduced from uncontradicted probative facts, it being exclusively within the province of the trial court to make all inferences and deductions of fact, where the facts necessary to support the judgment do not naturally follow as a necessary sequence from the probative facts, but must depend upon inferences to be deduced therefrom.

APPEAL from an order of the Superior Court of the City and County of San Francisco, granting a new trial. William T. Wallace, Judge.

The action was brought by Mary Cauhape, formerly Mary Pond, to recover a sum of three thousand dollars alleged to have been had and received by the Security Savings Bank to the use of the plaintiff, and to have it determined that an adverse claim to that sum made by the executors of the estate of Cora L. Floyd, deceased, to said moneys, was invalid. The evidence showed that the father of Cora L. Floyd had willed two thousand dollars to Mary Pond, and shortly before his death told his daughter Cora, who was the residuary legatee of his estate, in the presence of an executor of his will, that he had left a sum in his will to Mary Pond "for her faithful services," and he wished Cora to give Mary Pond, on his death, five thousand dollars, and he wished the executor to be a witness to this. The two thousand dollars was paid over according to the terms of the will; and Cora L. Floyd deposited a further sum of three thousand dollars in the Security Savings Bank on term deposit account, in her own name, and gave the bank a written direction signed by her, requesting it to "please pay to Mary Pond, or order, the dividends on my term deposit account for the sum of three thousand dollars, No. 1356, until further notice." Cora L. Floyd died, without revoking the or-

der, or giving any further notice or direction to the bank. After making the deposit, she stated as a reason why she had not paid over the principal, that Mary Pond had lost the money given her under the will, or that her husband had spent it, "and that she did not intend to give her any more, so she could get hold of it, for fear that she or her husband would lose that also, but that she had had it deposited in the Security Savings Bank for her, so she could have the income, but could not get away with the principal, and when she grew older or had a child, she might have something to depend upon," and "that she had kept a sort of nest egg for this woman who had been very good to her father." From the evidence, the court found in favor of plaintiff's right to the three thousand dollars, and gave judgment therefor. Defendant moved for a new trial, assigning the insufficiency of the evidence to justify the decision in various particulars, and also errors of law occurring at the trial, and excepted to by the defendant. The court granted the motion for a new trial, and the plaintiff appealed from the order.

A. F. Morrison, and Edward J. Pringle, for Appellant.

There is no serious question of fact in the case; and the order granting a new trial was the result apparently of a change in the view first taken by the trial court of the law bearing upon the facts. A trust in personal property in favor of the plaintiff was established by the evidence. Such a trust may rest in parol. (Civ. Code, sec. 2221; *Silvey v. Hodgdon*, 52 Cal. 363; *Hellman v. McWilliams*, 70 Cal. 449; *Doran v. Doran*, 99 Cal. 311; *Curdy v. Berton*, 79 Cal. 423; 12 Am. St. Rep. 157; *Williams v. Vreeland*, 32 N. J. Eq. 135; *Williams v. Fitch*, 18 N. Y. 546; *Roche v. George*, 93 Ky. 609; *Chamberlain v. Chamberlain*, Freem. Ch. 34; *Strickland v. Aldridge*, 9 Ad. & E. 516; 27 Am. & Eng. Ency. of Law, 54, 83.) There was no claim to be presented against the estate of Cora L. Floyd. The trust fund was a specific one, which had not reached that estate, and was no part of it. (*Roach v. Caraffa*, 85 Cal. 442; *McGrath v. Carroll*, 110 Cal. 82.)

Oliver P. Evans, and Sidney V. Smith, for Respondents.

VAN FLEET, J.—Appeal from an order granting a new trial. The grounds of the motion for new trial included that of in-

sufficiency of the evidence to justify the decision, and the order granting the motion was general in terms.

It is assumed as a premise by appellant, upon which he bases his argument for a reversal, that "there is no serious question of fact in the case; and the order granting a new trial was the result apparently of a change of the view first taken by the trial court of the law bearing upon the facts." The record fails to sustain this assumption. While the evidence tending to prove the circumstances relied on by plaintiff to sustain his right to recover was uncontradicted, the ultimate facts to be deduced therefrom depended largely and essentially upon inferences not in themselves obvious or certain. When the facts necessary to sustain the judgment do not naturally follow as a necessary sequence from the probative facts, but must depend upon inferences to be deduced therefrom, it is as exclusively the province of the trial court to make those deductions and find the facts, as where the evidence itself is conflicting. In fact, the evidence may, in such an instance, be said in one sense to be conflicting, since the facts which it tends to prove are uncertain until found.

In such a case, the trial court having in its discretion set aside its findings, for this court to reverse its order would be in effect coercing it to a particular conclusion upon a controverted question of fact, and this it is not within our power to do.

This renders the other questions discussed impertinent to our present inquiry.

Order affirmed.

Harrison, J., and Beatty, C. J., concurred.

[Crim. No. 290. Department One.—September 10, 1897.]

THE PEOPLE, Respondent, v. OLIVER W. WINTHROP, Appellant.

CRIMINAL LAW—TRIAL—TIME FOR PREPARATION—REFUSAL OF REQUEST—ABSENCE OF EXCEPTION—TRIAL WITHOUT OBJECTION—APPEAL—PRESUMPTION.

Where seventeen days' time was allowed to a defendant under indictment, in which to prepare for trial, and no exception was taken to an order refusing his request for thirty days' time for preparation, and defendant went to trial without objection that he was then unprepared for trial, or applying for a further continuance, it must be conclusively presumed upon appeal that he was then ready for trial; and where nothing appears in the record to show that he was prejudiced by the refusal of a longer time, no error is shown under the circumstances, and no violation appears of defendant's right to a reasonable opportunity to prepare for his trial.

ID.—DENIAL OF CHALLENGES FOR CAUSE—NONEXHAUSTION OF PEREMPTORY CHALLENGES.—The denial of defendant's challenges for cause will not be considered upon appeal, where it appears from the record that, when the jury was completed, the defendant had remaining more peremptory challenges unexhausted than there were denials of his challenges for cause. A defendant should not be heard to complain of error, the injurious effects of which he has suffered, if at all, only by reason of his acquiescence in or failure to avoid it, when he had the means and opportunity to do so.

ID.—ROBBERY—ENTICING VICTIM TO SUITABLE PLACE—EVIDENCE—DECLARATIONS OF DEFENDANT—PROPOSAL TO KIDNAP AND ROB.—Where the victim of the robbery charged against the defendant was a stranger in the city, to whom the defendant introduced himself under a false name, and who was enticed by the defendant to an isolated cottage, under the false representation that he was taking him to make a friendly call at defendant's home, in which cottage he was violently assaulted by defendant and a confederate, bound hand and foot, and robbed, and kept bound and confined under threats of torture and death, to induce him to authorize the payment of twenty thousand dollars to the defendant, evidence is admissible to show all of the declarations made by the defendant to the person robbed, and also to show that defendant had proposed to another witness that they should go in together, and "kidnap" the man, and force him by torture to make a check, or give up money, and had said that a house could be rented for that purpose, and that he thought fifty thousand dollars could be realized, and that he had told the witness on the day of the robbery that he had introduced himself to the man, and that he had the house rented, and his plans all formed, and was then waiting for him according to appointment; and such evidence, being admissible to connect defendant with the offense laid, and to identify him as a guilty participant therein, it is immaterial whether it had or had not a ten-

dency to show an intent to commit another offense.

ID.—EXHIBITS FROM SCENE OF ROBBERY.—Exhibits of articles taken from the house where the robbery was committed, and identified by the person robbed, and shown to have been used by defendant in connection with the offense, are admissible as a part of the transaction, and as tending to corroborate the witness as to the circumstances of the crime.

ID.—CIRCUMSTANCES OF ARREST—CONCEALMENT—DISGUISE—DECLARATIONS—ARTICLES TAKEN FROM DEFENDANT.—Evidence is admissible to show that at the time of the arrest the defendant was apparently hiding in disguise and passing under an assumed name, and denied his identity to the arresting officer, and that among the articles found on his person were several newspaper clippings containing accounts of the robbery, and a recently purchased railroad ticket from Oakland to Mojave.

ID.—LARCENY—ABSENCE OF INSTRUCTIONS.—An objection that the court erred in failing to instruct the jury that the offense of larceny was included in the charge against the defendant is not tenable, when no such instruction was requested, and where such instruction would not have been pertinent to any evidence in the case.

ID.—INSTRUCTION AS TO PRESUMPTION OF INNOCENCE.—An instruction to the jury that the presumption of innocence accompanies the defendant throughout the trial, and goes with the jury in their retirement to consider their verdict, and will avail to acquit the defendant unless overcome by sufficient proof of guilt, that they must examine the evidence by the light of that presumption, and that unless, upon examining it, they find it sufficiently strong to overcome and remove the presumption and to satisfy them of the defendant's guilt beyond a reasonable doubt, he is entitled to an acquittal correctly states the law.

ID.—PREPARATION OF AFFIDAVITS FOR NEW TRIAL—MISCONDUCT OF JURY—NEWLY DISCOVERED EVIDENCE—INADEQUATE SHOWING FOR FURTHER TIME.—There is no adequate showing of necessity for further time for the defendant to prepare affidavits on motion for new trial to establish misconduct of the jury and newly discovered evidence, where the showing does not indicate what the misconduct of the jury consisted in, or the name of any juror guilty of misconduct, nor state the nature of the newly discovered evidence desired, nor that there was any reasonable expectation that it could be obtained, nor why it could not have been produced at the trial.

ID.—PUNISHMENT FOR ROBBERY—IMPRISONMENT FOR LIFE—CONSTRUCTION OF PENAL CODE.—The provision of section 213 of the Penal Code, that robbery is punishable by imprisonment in the state prison "not less than one year," does not establish the intent of the legislature that the punishment must be limited to a definite term of years; but such intent is expressly negated by section 671 of the Penal Code, which expressly authorizes imprisonment for life in cases where no limit to the duration of the imprisonment is declared; and a sentence of imprisonment for life for robbery, is not in excess of the power of the court.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. William T. Wallace, Judge.

The facts are stated in the opinion of the court.

Frank V. Bell, for Appellant.

W. F. Fitzgerald, Attorney General, W. H. Anderson, Assistant Attorney General, and Henry E. Carter, Deputy Attorney General, for Respondent.

VAN FLEET, J.—Defendant was convicted of robbery and sentenced to life imprisonment. He appeals from the judgment and from an order denying his application for a new trial, urging numerous errors in the rulings of the trial court.

1. It is first strongly contended that the court violated defendant's rights in compelling him to go to trial with unseemly haste, and without sufficient time to adequately prepare for his defense.

The bill of exceptions shows that the indictment was filed August 7, 1896, and defendant arraigned thereunder on August 14th; that after certain proceedings of a more or less dilatory nature his plea was entered, and the case subsequently, on August 21st, came up to be finally set for trial. At this time defendant asked for at least thirty days in which to prepare for trial, making a very general showing that he could not reasonably prepare earlier; but this request was denied, and the case was set down to be tried on September 1st. No exception was taken to the action of the court in thus refusing defendant's request for a longer time in which to prepare for trial, and on September 1st, when the case was called, defendant, as stated in the bill of exceptions, "went to trial without at that time making any objection to doing so; he did not at that time claim that he was then unprepared for trial, and he did not then apply for a further continuance of the case; he had had in all some seventeen days of time."

It will thus be seen that the record wholly fails to disclose a case violative of defendant's right to a reasonable opportunity to prepare for his trial. We cannot say as matter of law that a period of seventeen days was not sufficient time, under the circumstances surrounding him, for such purpose; and the record fails to show that it was not such as a mat-

ter of fact. Indeed, there is nothing in the record which in any way indicates that the defendant was not fully ready for trial on September 1st; to the contrary, the fact that he at that time went to trial without objection gives rise to the conclusive presumption here that he was ready. Nor was there anything arising in the course of the trial which points to the conclusion that defendant was prejudiced by the action of the court in then proceeding with the trial. Under such circumstances no error is shown. The language quoted and relied upon by appellant from *People v. Fredericks*, 106 Cal. 554, on this subject, had reference to the particular circumstances of that case; it does not announce a rule of conduct for other cases, and has no proper application to the facts before us.

2. It is next objected that the court erred in denying defendant's challenge for cause to each of the jurors McMillan and Fogg. Under the doctrine of the very recent and well-considered case of *People v. Durrant*, 116 Cal. 179, it is unnecessary to consider the question mooted by counsel, whether the examination of these jurors disclosed a state of mind on the part of either or both which would render the ruling of the court in disallowing the challenges erroneous, since it appears from the record that when the jury was completed the defendant yet had three peremptory challenges unexhausted. It was held in that case, after mature consideration, that where challenges for actual bias are made by the defendant and denied, and the defendant fails thereupon to exercise his right to challenge the jurors peremptorily, but accepts them, and it appears that when the jury was completed the defendant had more than sufficient unused peremptory challenges to have enabled him to remove the obnoxious jurors, the ruling of the court in disallowing the challenge for cause will not be reviewed here, because, even if erroneous, it will be regarded as without prejudice. This is put upon the manifestly sound ethical principle that a defendant should not be heard to complain of an error the injurious effects of which he has suffered, if at all, only by reason of his acquiescence in or failure to avoid it when he had the means and opportunity to do so.

3. The robbery occurred in the city of San Francisco on August 3, 1896, under circumstances substantially these: The victim, James Campbell, a stranger in the city, a man of advanced

years, was induced by defendant, under the false pretense and representation that he was taking him to make a friendly call at defendant's home, to accompany the latter to a small and somewhat isolated cottage in the extreme western and thinly settled portion of the city, where, after being introduced into the house, he was violently assaulted by defendant and a confederate, knocked down, bound hand and foot, a considerable sum of money and some other valuables taken from his person, and then kept bound and confined for more than two days, under repeated threats of torture and death, in an effort to induce him to sign papers intended to authorize the payment of twenty thousand dollars to defendant.

The theory of the prosecution was that the robbery was the result of a deliberate and previously concocted scheme and plan of the defendant to entice Campbell to the house where the robbery occurred for the purpose of robbing him and extorting a large sum of money from him as the price of his liberty. In accordance with this theory the prosecution was permitted, against defendant's objections, to introduce evidence tending to show that Campbell, whose home was in the Hawaiian Islands, had, while stopping at the Occidental Hotel in the city of San Francisco during the months of June and July, 1896, attracted the attention of defendant, who was about the hotel lobby; that defendant made inquiries about him, and learning that he was a very wealthy man from Honolulu, expressed a desire to get acquainted with him; that prior to the robbery he, on several occasions, approached one Urquhart, an acquaintance of his, of whom he had made inquiries about Campbell, with a proposition that they go in together and "kidnap" Campbell and force him to give up money, suggesting that a house or other suitable place could be rented where they could take him and force him by torture to make a check, or by other means give up money, and that he thought fifty thousand dollars could be realized. It was shown that on the thirty-first day of July, while Campbell was stopping temporarily at the Hotel Vendome in the city of San Jose, defendant appeared there, and, approaching Mr. Campbell, introduced himself under a false name, and, engaging him in conversation, commenced making inquiries about the Hawaiian Islands, stating in substance that he had a large amount of money to invest, and had about concluded to invest in the islands. He stated that the only

7. On the subject of the presumption of innocence the court instructed the jury: "As observed already, Winthrop alone is on trial, and his plea to the indictment is a plea of not guilty. Upon that plea a presumption of his innocence arises; that presumption accompanies him throughout the trial; it goes with you in your retirement to consider your verdict; it will avail to acquit Winthrop unless it be overcome by sufficient proof of guilt; you must examine the evidence by the light of that presumption, and unless upon examining it you find it sufficiently strong to overcome the presumption of innocence, to remove it, and moreover, to satisfy you of Winthrop's guilt beyond all reasonable doubt, he is entitled to an acquittal at your hands." It is objected that this instruction is erroneous under the doctrine announced in *People v. McNamara*, 94 Cal. 509, where it was held that this presumption rested with the defendant until the jury have arrived at a verdict. But the instruction in that case merely told the jury that the presumption remained "all through the case *until it is submitted to you*," and there stopped. The jury were not told that they must keep that presumption in mind after their retirement for consideration. The present instruction is very different; it tells the jury expressly that the presumption "goes with you in your retirement to consider your verdict," and that the jury must "examine the evidence by the light of that presumption." We regard this language as stating the law as amply and correctly as any instruction on the question heretofore approved by this court.

8. We can see no error in the action of the court in refusing defendant's request for more time to prepare affidavits in support of his motion for a new trial. There was no adequate showing of necessity for any further time. The showing made did not indicate what the misconduct of the jury consisted in, or the name of any juror guilty of misconduct; nor did it state what the nature of the newly discovered evidence was which defendant desired to obtain, nor that there was any reasonable expectation that it could be obtained; nor why it could not have been produced at the trial. In fact, the showing was so wholly bald of essential character in several respects as to render any interference on our part with the discretionary judgment of the court below an abuse of power.

9. The punishment imposed is not in excess of the power of the court. Robbery is punishable by imprisonment in the state prison "not less than one year." (Pen. Code, sec. 213.) Defendant urges that it was the evident intent of the legislature that the punishment must be limited to a definite term of years. Such intent is expressly negatived by section 671 of the Penal Code, which in terms declares what effect is to be given to the provision found in section 213.

There are some other exceptions noted, but in a more or less perfunctory manner, without suggestion of the prejudicial character of the rulings, even if erroneous. They need not be noticed further than to say that they have all been examined, and we find in them no ground for reversal.

Judgment and order affirmed.

Garoutte, J., and Harrison, J., concurred.

[Sac. No. 854. Department Two.—September 10, 1897.]

FRANCESCA B. SCAMMAN, Executrix, etc., Appellant, v. A.
BONSLITT et al., Respondents.

INSOLVENCY—OPERATION OF INSOLVENT LAWS—CONTRACT WITH CITIZENS OF OTHER STATES.—The insolvent laws of one state have no extraterritorial operation, and cannot discharge contracts with citizens of other states, unless the citizen of another state voluntarily becomes a party to the insolvency proceeding.

Id.—CONTRACT MADE BETWEEN CITIZENS OF CALIFORNIA—REMOVAL OF CREDITOR TO ANOTHER STATE—ACTION IN THIS STATE—VALIDITY OF DISCHARGE. Although, as a general rule, a citizen of another state, who has not become a party to insolvency proceedings in this state, is not bound by such proceedings, or by the discharge therein; yet, where it appears that the debtor and creditor were both citizens of California at the date of the contract, and that the contract was made and is payable in this state, it seems that, in an action brought in this state by the creditor to enforce such contract, a certificate of discharge of the debtor under the insolvent law of this state enacted before the indebtedness accrued, is a valid defense to the action, even though the creditor had become a resident of another state after the making of the contract.

Id.—FORECLOSURE OF MORTGAGE—INSOLVENCY OF MORTGAGOR—COMPLAINT AND DECREE NOT ESTABLISHING PERSONAL LIABILITY—VOID AMENDMENT—ORDER QUASHING EXECUTION—REASONS FOR ORDER IMMATERIAL.—Where

the complaint upon the foreclosure of a mortgage, made between citizens of this state to secure a note made payable therein, averred that the mortgagor had been declared an insolvent, and did not aver that the mortgagee was a nonresident of the state, and did not pray for any judgment for deficiency against the mortgagor, and the complaint failed to make a case entitling the plaintiff to a decree declaring the defendant personally liable, and where the decree omitted to establish any personal liability, an ex parte amendment, made more than seventeen months after the entry of the final decree, establishing the personal liability of the mortgagor, and directing the clerk to docket a deficiency judgment against him, is without jurisdiction and void; and an order quashing executions upon such deficiency judgment must be affirmed, regardless of the reasons upon which the superior court may have based such order.

JUDGMENTS—NOTICE OF MOTION TO AMEND—AMENDMENT WITHOUT NOTICE.—

Although a court may at any time, with or without notice, amend a judgment, where the record discloses that the judgment of the court was not correctly given, or where clerical misprisions have occurred, of which the record affords the evidence, yet, when an inspection of the record does not show the error, and resort must be had to evidence aliunde, notice must be given of a motion to amend the judgment to the parties affected thereby; and where an amendment is made to a judgment in matter of substance, whereby it is made to grant relief different from that granted when it was rendered, it is absolutely void as against a party having no notice of the application to amend it.

ID.—TIME FOR AMENDMENT OF JUDGMENT.—A motion to amend a judgment, where the record does not disclose the error, must be made upon notice within six months, except in cases where personal service of summons has not been had, in which cases the court may grant relief within one year after the entry of the judgment.

ID.—LIMITS OF POWER TO AMEND JUDGMENT—REVISION IMPROPER—CHANGE UNAUTHORIZED AT DATE OF ENTRY.—Amendments of judgments can only be allowed for the purpose of making the record conform to the truth, and not for the purpose of revising and changing the judgment; and where the proposed addition is a mere afterthought, and formed no part of the judgment as originally intended and pronounced, it cannot be brought in by way of amendment; and, in the absence of express statutory authority so to do, no court can amend its judgments so as to include in them provisions which it could not have inserted at the date of the original entry of the judgment.

APPEAL from an order of the Superior Court of Butte County quashing and recalling executions. John C. Gray, Judge.

The facts are stated in the opinion.

Freeman & Bates, for Appellant.

W. E. Duncan, Jr., and R. E. Robinson, for Respondent.

SEARLS, C.—About November 20, 1894, Francesca B. Scamman, as executrix of the last will of Henry Scamman, deceased, brought an action in the superior court in and for the county of Butte to foreclose a mortgage executed by A. Bonslett, August 1, 1889, to secure the payment of his promissory note for eight thousand five hundred dollars of even date, payable five years after date, with interest made and payable in this state.

The complaint averred that the defendant, A. Bonslett, had been on the — day of October, 1894, adjudged and declared to be an insolvent debtor upon his petition filed under the Insolvent Act of 1880, and that E. E. Biggs had been elected, etc., as the assignee of said insolvent, had qualified as such, and that all of the estate of the insolvent had been assigned to him.

That the mortgaged property was insufficient to satisfy the mortgage. The assignee, as well as Bonslett, were made defendants.

The complaint did not pray for a deficiency judgment against Bonslett in case there should be a deficiency after the sale of the mortgaged property.

L. L. Green was also made a defendant upon the ground that he had or claimed some interest in the mortgaged premises. He answered disclaiming any interest.

Defendants Bonslett and Biggs, as assignee, made default, and on January 19, 1895, a decree of foreclosure in the usual form was entered ordering a sale of the property and payment to plaintiff, out of the proceeds of such sale, of the sum of eleven thousand six hundred and eight dollars, besides costs, attorneys' fees, etc. No provision was made in the decree for any deficiency which might remain after sale. The property was sold under the decree, and a return made April 1, 1895, showing a deficiency of seventeen hundred and seventy-three dollars and sixty-five cents.

On the twenty-eighth day of October, 1895, defendant A. Bonslett was, by a decree of the superior court in the insolvency proceedings, discharged from all his debts existing against him on and prior to September 24, 1894, under and by virtue of the Insolvent Act of 1880, excepting only such debts, if any, as are by the said insolvent laws excepted from the operation of a discharge in insolvency.

The petition and schedule in insolvency filed by said defendant described among his debts and liabilities the note and mortgage of Scamman.

On the seventeenth day of September, 1896, the superior court, on motion of plaintiff and without notice to defendant Bonslett, entered two orders in the case, viz:

1. An order amending the decree of foreclosure of January 19, 1895, by adding thereto the following, "and the defendant, A. Bonslett, is declared and adjudged to be the defendant who is personally liable for the sums in this judgment specified, to wit, said sum of eleven thousand six hundred and eight dollars, and interest and costs of suit."

2. An order directing the clerk of the court to docket a deficiency judgment against defendant Bonslett for seventeen hundred and seventy-three dollars and fifty cents, with interest, etc.

Thereafter two executions issued on said deficiency judgment, one to the sheriff of Butte county and the other to the sheriff of Yuba county.

Defendant Bonslett moved the court to set aside the amendments to the decree and for an order quashing the executions, etc., upon a variety of grounds, which we need not specify at length.

On the part of plaintiff the affidavit of S. Davis was admitted showing that from the year 1880 to the date of his death in 1893 Henry Scamman, the mortgagee, was a nonresident of the state of California and a resident and citizen of Saco, in the state of Maine, at which last-named place his family, including the plaintiff herein, have at all times resided. The mortgage described said Henry Scamman as a resident of Downieville, county of Sierra, state of California.

It was admitted that plaintiff never presented any claim, and did not appear in the insolvency proceedings of A. Bonslett.

The court denied the motion to strike out the amendments to the judgment and the order to docket the deficiency judgment, and granted the motion to recall and quash the executions, from which order so recalling and quashing the executions, plaintiff prosecutes this appeal.

1. "Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extraterritorial operation, and consequently the tribunal sitting under them, un-

less in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no legal obligation to appear, and, of course, there can be no legal default." (*Baldwin v. Hale*, 1 Wall. 223; *Rhodes v. Borden*, 67 Cal. 7; *Bedell v. Scruton*, 54 Vt. 493; *Bean v. Loryea*, 81 Cal. 151.)

It follows that if plaintiff's testator was in fact a citizen of another state he was not bound by the insolvency proceedings under the statute of this state.

2. But, notwithstanding the foregoing well-settled proposition, we are at a loss to see upon what grounds the amendment to the decree of September 17, 1896, can be upheld.

If that amendment and the accompanying order directing the docketing of a deficiency judgment against defendant were void, the executions issued thereon should have been quashed, and if the court decided correctly, although basing its action upon erroneous reasoning, its action must be upheld.

A court may at any time render or amend a judgment where the record discloses that the entry on the minutes does not correctly give what was the judgment of the court. (*Morrison v. Dapman*, 3 Cal. 255.)

Any error or defect in a record occurring through acts of omission or commission of the clerk in entering or failing to properly enter of record the judgment or proceedings of the court—in short, what may be termed clerical misprisions—may, the record affording the evidence thereof, be corrected at any time by the court upon its own motion, or on motion of an interested party either with or without notice. Where, however, an inspection of the record does not show the error, and resort must be had to evidence aliunde, courts will require notice to be given of a motion to amend a judgment to the parties to be affected thereby, and a motion for the amendment of a judgment in such last-mentioned case must, under section 473 of the Code of Civil Procedure, be made within six months, except in cases where personal service of summons has not been had, in which cases the court may grant relief within one year after the entry of judgment. (*People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448; *Hegeler v. Henckell*, 27 Cal. 495; *Bostwick v. McEvoy*, 62 Cal. 502; *Wharton v. Harlan*, 68 Cal. 422.)

Again, amendments to judgments can only be allowed for the purpose of making the record conform to the truth, not for the purpose of revising and changing the judgment. (Black on Judgments, sec. 156.) The same author adds:

"If, on the other hand, the proposed addition is a mere after-thought, and formed no part of the judgment as originally intended and pronounced, it cannot be brought in by way of amendment."

We may add that, in the absence of express statutory authority so to do, no court can amend its judgments so as to include in them provisions which it could not have inserted at the date of the original entry. How, then, stood the case at the date of the amendment of the judgment?

Plaintiff had brought her action to foreclose, and not only had not asked for any relief except the foreclosure and sale of the mortgaged property, but by the affirmative allegations of her complaint showed that defendant Bonslett had been declared an insolvent, etc., and, having failed to aver that her testator was a citizen of another state, she failed to make a case entitling her to have the court, by its decree, declare said defendant "personally liable for the debt," as provided by section 726 of the Code of Civil Procedure. A deficiency judgment may be docketed by the clerk, when shown to be necessary by the return of the sheriff, but it can only be so docketed against the defendant or defendants declared personally liable by the decree. In a foreclosure suit, where judgment is taken by default, the decree can give no relief beyond that which is demanded in the bill. (*Raun v. Reynolds*, 11 Cal. 15.)

Had the plaintiff asked that defendant Bonslett be declared personally liable, *non constat*, but that he would have answered setting up the insolvency proceedings, and his immunity from personal liability thereunder. But under the complaint it was not necessary for him so to do, as no personal liability was sought to be enforced against him. Had the court included the personal liability clause in the original decree, it would have been erroneous, but we are not prepared to say it would have been void. (*Blondeau v. Snyder*, 95 Cal. 521.)

But when the court waited for over seventeen months after the entry of the final decree, and then without notice to defendant

Bonslett amended the decree, in matter of substance, granting relief different from that asked for or granted originally, we think the amendment was without jurisdiction and void.

Freeman, in his work on Judgments, at section 72 says: "If, however, an amendment is made to a judgment or decree in a matter of substance, whereby it is made to grant relief different from that granted when it was rendered, it is absolutely void as against a party having no notice of the application to thus amend it." (Citing *Swift v. Allen*, 55 Ill. 303.) The amendment being void was sufficient reason for quashing the executions. (*Chipman v. Bowman*, 14 Cal. 157; *Gates v. Lane*, 49 Cal. 266; *Buell v. Buell*, 92 Cal. 393.)

We cannot determine from the record precisely the ground upon which the court below discharged the writs.

The note secured by the mortgage was given and made payable at Gridley, in the state of California, and the mortgage recited, as before stated, that Scamman was a resident of this state.

Among the conclusive presumptions under section 1962 of the Code of Civil Procedure is the following: "The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration."

The court below may have been of opinion that the debtor and creditor, having both been citizens of California at the date of the contract, which was made and payable in this state, in an action brought in the courts of this state to enforce such contract, a certificate of discharge of the debtor under the insolvent law of this state enacted before the indebtedness accrued is a valid defense to the action, even though the creditor had become a citizen of another state, after the making of the contract.

If this was the theory of the court, its conclusion is not without warrant in law. (Freeman on Judgments, sec. 604, and cases there cited.)

Again, as the question of the citizenship of Scamman was one of fact, the court may have concluded as a fact that he remained a citizen of the state of California.

We need not pursue, discuss, or decide these questions, as we are of opinion the amendment to the judgment was void; such

determination is conclusive of the case, and the order appealed from should be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

[Sac. No. 211. Department Two.—September 10, 1897.]

GEORGE SIMMONS, Appellant, v. MARION THRESHOUR,
Administrator of the Estate of William Gibson, Deceased,
Respondent.

EJECTMENT—EVIDENCE OF PLAINTIFF'S TITLE—FORECLOSURE OF MORTGAGE—LOSS OF JUDGMENT-ROLL—JUDGMENT-BOOK—RECITALS IN JUDGMENT.—In an action of ejectment, when the plaintiff claims title under the foreclosure of a mortgage against the defendant, and a sheriff's deed under the order of sale of the mortgaged premises, and it appears that the judgment-roll in the action of foreclosure was lost, the judgment-book is competent evidence of what matters were passed upon and determined by the court, and the recitals in the judgment showing acquisition of jurisdiction over the defendants are at least prima facie evidence of the truth of the facts recited, and of the validity of the judgment, and the judgment-book should be admitted as part of plaintiff's proofs, together with the sheriff's certificate of sale, and the deed founded upon it.

APPEAL from a judgment of the Superior Court of Siskiyou County. J. S. Beard, Judge.

The facts are stated in the opinion.

James F. Farragher, for Appellant.

Gillis & Tapscott, for Respondent.

BRITT, C.—This action was ejectment for certain real estate in Siskiyou county. At the trial plaintiff offered in evidence a mortgage, covering the demanded premises and other lands, to him executed by several persons of whom Gibson, originally the defendant herein, was one; also an entry in the judgment-book of

the court purporting to be the record of a judgment in a former action prosecuted by said plaintiff against the said mortgagors, including Gibson, for the foreclosure of said mortgage; such judgment contained recitals that it was shown to the court by satisfactory evidence that all the defendants in that action had been duly served with summons in the county, and had failed to answer and their default had been duly entered; that the facts alleged in plaintiff's complaint were proved, etc; these were followed by the usual directions for the sale of the mortgaged premises. Plaintiff further offered a certificate of sale issued to him by the sheriff, also the sheriff's subsequent deed, both founded on said judgment and appearing to be regular in form; they showed, if the judgment was valid, that plaintiff as purchaser at his own foreclosure sale acquired the title of defendant to the premises in suit here. The clerk of the court testified that he had made diligent search in the archives of his office for the judgment-roll in said action of foreclosure, but was unable to find or produce it. All the said documentary evidence was excluded by the court on the objection of defendant that the same was not accompanied by the judgment-roll.

The judgment-book is part of the records of the court, and is the final repository of the determination of the court upon every cause which passes to judgment (Code Civ. Proc., sec. 688); it is, of course, a judicial record, and is competent evidence of what matters were considered and passed upon by the court (Code Civ. Proc., secs. 1904, 1905); it is indeed the most permanent memorial of those matters ordained by law to be kept. As the record offered in this instance was competent evidence of the final adjudication in the former suit, so its recitals showing acquisition of jurisdiction over the defendants therein were evidence of the facts recited; the judgment thus carried on its face evidence of its own validity (*Whitney v. Daggett*, 108 Cal. 232; *Howard v. McChesney*, 103 Cal. 536; *People v. Harrison*, 84 Cal. 607); consequently, it should have been admitted as part of plaintiff's proofs, together with the sheriff's certificate and deed founded upon it.

We are not unmindful of the decision in *Wickersham v. Johnston*, 104 Cal. 407, 43 Am. St. Rep. 118, and the previous cases there followed (*Harper v. Rowe*, 53 Cal. 233; *Mason v. Wolff*, 40

Cal. 249; *Young v. Rosenbaum*, 39 Cal. 646), nor do we now impugn the principle on which they proceed, viz., that to render a judgment admissible in evidence it must be shown to be a valid judgment, and that the appropriate method of doing this is to produce the roll so that it may be seen whether the court had jurisdiction to determine the cause. But in none of those cases does it appear that facts showing that the court had jurisdiction were recited in the judgment itself; since such recitals are evidence of their own truth, as numerous decisions of this court establish, they necessarily (when consistent with other parts of the judgment) supply the absence of the technical roll to the extent of rendering the judgment at least prima facie competent as evidence. Besides, *Wickersham v. Johnston*, and *Young v. Rosenbaum*, were cases of foreign judgments, between which and domestic judgments it may be that a distinction lies as to mode of proof. (*Estate of Eichhoff*, 101 Cal. 600.) The judgment appealed from should be reversed.

Chipman, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 351. Department Two.—September 10, 1897.]

JOSEPH M. NOUGUES, Appellant, v. FRANCIS G. NEWLANDS, as Trustee of Estate of William Sharon, Deceased, et al., Respondents.

TRUSTS—UNAUTHORIZED CONVEYANCES BY TRUSTEE—PROTEST OF BENEFICIARY—IMPLIED TRUST—LIMITATIONS—RUNNING OF STATUTE—REPUDIATION UNNECESSARY.—Where a trustee of land, without the consent and against the protest of a beneficiary, made an unauthorized conveyance to the successor of another beneficiary, who took with full knowledge of the terms of the trust, the grantee took the legal title upon an implied trust in favor of the protesting beneficiary, as an involuntary trustee of a trust cast upon him by operation of law; and the statute of limitations against an action for an accounting and enforcement of the implied trust commenced to run upon the acceptance of such conveyance, and the limitation which bars the

action is four years from that time; nor is it necessary, in order to set the statute in motion, that the involuntary trustee should have attacked or repudiated the trust.

ID.—RECOGNITION OF RIGHTS OF BENEFICIARIES—WRITTEN DECLARATION REQUIRED.—A mere oral recognition by the involuntary trustee of the rights of the beneficiaries cannot operate in law to change his position from that of an involuntary to that of an express trustee; but, in order to accomplish this, the trustee must have declared the trust by a signed instrument in writing.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

J. M. Nougues, and Charles E. Nougues, for Appellant.

James M. Allen, and William F. Herrin, for Respondent.

HENSHAW, J.—Plaintiff filed his bill seeking an accounting from the defendants because of matters hereinafter set forth. The defendant Newlands was alone served with summons, and he appeared and interposed a demurrer to the bill: 1. Upon the ground that it failed to state a cause of action; and 2. That the cause of action stated was barred by the statute of limitations. The trial court held that the cause of action was so barred, and rendered judgment accordingly. From that judgment plaintiff appeals.

The bill is of great length, but the facts essential to this consideration may be thus summarized: In January, 1874, plaintiff Nougues, Henry F. Williams, one of the defendants, and William C. Ralston, by agreement associated themselves together in a joint venture for the purpose of purchasing, improving, and selling certain lands in the city and county of San Francisco. To this venture Ralston was to contribute money to purchase the lands in a sum not exceeding one hundred and seventy-five thousand dollars. Nougues and Williams were to improve these lands by bulkheading them and filling them in, and to contribute for this purpose an equal amount of money. Ralston's interest in the venture was to be one-half; that of Nougues and Williams one-fourth each. Maurice Dore was to act as trustee of the parties, was to purchase and contract for the purchase of the lands in his own name, and take the legal title thereto. If any lands were leased, the leases were to be taken in the name of Williams

for the benefit of the three partners. Under this agreement certain lots were purchased by Dore in his name, and contracts of purchase were made between Dore and others, Dore paying for Ralston a portion of the purchase price on the contracts. Ralston died on August 27, 1875, having on the day of his death executed a trust deed of all his property to William Sharon. Sharon accepted the trust and entered into the control and management of Ralston's property thereunder. After Ralston's death Dore declined to make further advances for the purchase of the lots, and so did Sharon, saving that in July and September of 1876 Sharon paid in the aggregate over eleven thousand dollars in fulfilling the terms of a contract of purchase which had theretofore been made with one Reis, and received a deed from Reis of the property. In November, 1875, and again in January, 1876, Sharon requested Dore to convey to him the property so held by him in trust. At all these times Sharon was fully informed of the terms and conditions of the agreement and joint venture of Ralston, Nougues, and Williams, and of Dore's relation thereto. Dore declined to comply with Sharon's request, again informing him of the conditions of the trust under which he held the property. On June 12, 1878, Sharon notified Dore of Ralston's deed of trust to him, informed him that he had advanced large sums of money for the payment of balances due on contracts of purchase of portions of the land, and demanded the conveyance by Dore of the property. Dore notified Nougues, who objected to the proposed conveyance, but, notwithstanding these objections, Dore did convey to Sharon upon the fourteenth day of June, 1878, and with the deed delivered to Sharon upon Nougues' request a notice in writing signed by Nougues to the effect that he, Nougues, was the owner of an undivided one-half of the property, and containing a statement of the terms and conditions upon which Dore held the title to the property in trust. Before the date of Dore's deed to Sharon Nougues had acquired from Williams his interest in the venture. Nougues and Williams had at that time expended the sum of one hundred and sixty thousand dollars pursuant to the terms of their agreement.

"William Sharon in his lifetime always recognized and admitted the interest of said defendant Henry F. Williams and

the plaintiff Joseph M. Nougues in said real property herein mentioned, and which was conveyed to him by the said Maurice Dore and the said Gustave Reis, as hereinbefore averred, but claimed that the estate of William C. Ralston, of which he was trustee, was insolvent; that he, said William Sharon, had been compelled to make large advances on the said property herein described and called and styled by him, said William Sharon, as 'Water lots, Channel and Berry streets'; and that the entire property was indebted to him, William Sharon, for advances made in fulfilling contracts of purchase, and for the payment of interest and taxes and interest due him, said William Sharon; and that the property had greatly depreciated in value, and that when reimbursed the money expended by him, whatever rights anyone had in and to said property would be settled and adjusted, and at all times recognized the claim and right of the said plaintiff, Joseph M. Nougues, and of said Henry F. Williams, defendants herein."

Sharon thus continued to hold the legal title to this property, saving the title to certain of the lots which he sold, until his death. He died upon November 15, 1885. In contemplation of death, upon November 4, 1885, he made a trust deed of all the property here in controversy, and of all the property of the estate of Ralston, to F. G. Newlands and F. W. Sharon. The trustees last named accepted the trust and entered upon its conduct. Thereafter, upon March 23, 1883, F. W. Sharon resigned as trustee, and Newlands became and ever since has been the sole trustee. No part of the lands in controversy has been disposed of by the trustees.

All the beneficiaries under the Sharon trust are without the jurisdiction of the court. Defendant Newlands is a nonresident of the state and a citizen of another state, and since the execution and delivery of the Sharon trust deed, upon November 4, 1885, has been absent from the state for four years, and at the time of the commencement of this action was absent from the state. This action was commenced upon January 29, 1892, more than thirteen years after the date of the Dore deed, nearly seventeen years after Ralston's death, and seven years after Sharon's death.

The questions coming here for consideration upon demurrer, and the matters well pleaded in the bill thus being taken as true,

it may at once be said that a cause of action is stated, and there is left for consideration the single proposition whether or not that cause of action is barred by the statute of limitations.

When Dore conveyed to Sharon he committed a clear violation of his trust, which, as pleaded, was to hold the legal title in his own name until a sale of the property, and then to dispose ratably of the proceeds of the sale. Sharon, taking the deed from Dore and the earlier deed from Reis with full knowledge of the trust, became an involuntary trustee of a trust cast upon him by operation of law. (Civ. Code, secs. 2223, 2224, 2244; *Lathrop v. Bampton*, 31 Cal. 17; 89 Am. Dec. 141.) That Nougues recognized that the Dore deed was in violation of the trust is shown by his protest against the making of it. Ralston's trust deed to Sharon did not create Nougues and Williams beneficiaries thereunder, and Sharon's acts and declarations concerning that trust deed could not enlarge its scope. (*Burling v. Newlands*, 112 Cal. 476.) In the case last cited the trust deed from Ralston to Sharon is set out *in extenso*. To what is there said there need be added for the purposes of this case no more than this, that, considering the relations which are pleaded to have existed between Ralston, Nougues, Williams, and Dore, Sharon by that deed occupied Ralston's place and succeeded to Ralston's rights in the venture. His right was to a share in the proceeds arising from the sale of the property. Ralston himself would have had no right to demand a conveyance from Dore, and Sharon as trustee acquired no better right.

From every point of view, then, Sharon became an involuntary trustee upon his acceptance of the Dore deed, and the statute of limitations commences to run against one who with knowledge of the facts has thus taken property in violation of an express trust immediately when the wrong complained of is done, and the limitation which bars the right of action is four years from the date of the act. (Code Civ. Proc., sec. 343; *Piller v. Southern Pac. R. R. Co.*, 52 Cal. 42.) In *Hecht v. Stanley*, 72 Cal. 363, it is said: "Whatever may once have been the rule, it is now well settled that the statute of limitations runs in favor of a defendant chargeable as trustee of an implied trust, and it is not necessary in order to set the statute in motion that he should have attacked or repudiated the trust."

The recognition by Sharon of the rights of Nougues and Williams, which is pleaded in a paragraph of the bill above quoted, could not operate in law to change the position of Sharon from that of an involuntary to that of an express trustee. To accomplish this Sharon must have declared the trust by a signed instrument in writing. (Civ. Code, sec. 852.) It is not averred that he ever did this, and, to the contrary, the matters pleaded distinctly negative the idea that such was the fact.

The amendments proposed by plaintiff were not such as would have relieved the complaint from the operation of the statute. It was not error, therefore, for the court to refuse leave to incorporate them in the pleading.

The judgment appealed from is affirmed.

McFarland, J., and Temple, J., concurred.

[Sac. No. 194. Department Two.—September 10, 1897.]

JOHN H. WISE et al., Appellants, v. M. M. WAKEFIELD, Respondent.

ACTION FOR BALANCE OF ACCOUNT—VERDICT FOR LESS THAN SUM CLAIMED—MOTION FOR NEW TRIAL—STATEMENT—INSUFFICIENCY OF EVIDENCE—IMPROPER SPECIFICATIONS.—In an action for a balance due upon a mutual and open account, where the verdict and judgment for the plaintiffs were for a less amount than the sum claimed in the complaint, a mere general specification in the statement on motion of the plaintiffs for a new trial, that "the evidence was insufficient for the jury to find that plaintiffs were only entitled to judgment for the sum" specified in the verdict, without setting forth what additional items of credit were claimed to be established by the evidence, is merely equivalent to saying that the verdict should have been for a larger sum, and is not available as a specification.

ID.—CONDITIONAL LEAVE TO AMEND COMPLAINT—INCREASE OF OFFER FOR JUDGMENT—DISCRETION.—Where the plaintiffs applied for leave to file an amended complaint setting forth additional items of account to conform to proofs, by which the balance of account in their favor was materially augmented, it is discretionary with the court to grant the amendment proposed, on condition that a previous offer of judgment by defendant be deemed increased to correspond with the increased demand of the complaint, and it is not an abuse of discretion to deny the application, where such condition was rejected by plaintiffs.

ID.—AGENT FOR PLAINTIFF AS WITNESS FOR DEFENDANT—IMPEACHMENT BY DEFENDANT—INSUFFICIENT OBJECTION.—Where an agent for the plaintiffs had testified fully for the plaintiffs, and was afterward called as a witness for the defendant, the defendant is not entitled, upon an unfavorable answer from the witness, to impeach his general reputation for truth, honesty, and integrity, if objection thereto were properly raised; but objection to such impeaching evidence is not properly raised by a mere general objection that the evidence is "incompetent, irrelevant, and immaterial," it being competent in a general sense, and only incompetent because of the fact that defendant had made the impeached witness his own, which must be specified in order that the point of the exception may be apparent to the court.

ID.—IMPEACHMENT NOT CONFINED TO PLACE OF RESIDENCE—INSUFFICIENT OBJECTION.—The objection that the impeaching evidence was not confined to the place of residence of the witness must be specifically stated, and is not properly raised by a general objection that the evidence is incompetent and irrelevant.

ID.—QUESTION AS TO BELIEF OF WITNESS UNDER OATH—RULE UNCHANGED BY CODE.—A witness who has testified to the general reputation of another witness as to truth, honesty, and integrity may be asked whether, on such reputation, he would believe him under oath; and the rule in this respect established in *Stevens v. Irwin*, 12 Cal. 306, has not been changed by the enactment of section 2051 of the Code of Civil Procedure.

ID.—OFFER OF EVIDENCE—ORAL OFFER—DISCRETION.—The court has discretion to permit a formal offer of evidence to be made orally; and it is not an abuse of discretion to overrule an objection that the offer should be in writing.

ID.—PROOF OF MOTIVE OF ACTION IMMATERIAL—ERROR WITHOUT PREJUDICE—ADMISSION OF DEBT.—Upon the issue as to whether defendant owed plaintiffs the balance of account alleged by them, proof as to the motives of plaintiffs in bringing the action is immaterial; and it is not admissible for defendant to prove that the action was not brought in good faith, but to get defendant's place of business by attaching his stock in trade; but if such evidence is received without objection, a subsequent answer to a question as to what induced the defendant to think the action was maliciously brought, to which objection was made, taken in connection with evidence admitting that defendant owed plaintiffs something, and had refused to pay them before suit was brought, is error without prejudice.

ID.—RECOVERY LIMITED TO ALLEGATIONS OF COMPLAINT—NONCOMPLIANCE WITH CONDITION OF AMENDMENT—INSTRUCTION PROPERLY REFUSED.—There can be no recovery beyond the allegations of the complaint without an amendment; and where an amendment was conditionally granted, and the condition was not accepted by the plaintiff, it is proper to refuse to instruct the jury in such a manner as to permit the recovery of a greater sum than that averred in the complaint.

ID.—GOODS FURNISHED BY DEFENDANT ON ORDER OF AGENT OF PLAINTIFFS—CHARGE TO THIRD PARTIES—REFUSAL OF INSTRUCTIONS—INSTRUCTION ALREADY GIVEN—PRESUMPTION OF FACT.—Where defendant claimed credit

against plaintiffs for goods furnished to third persons on order of plaintiffs' agent, some of which were charged directly to the persons receiving them, an instruction requested by the plaintiffs that the jury should not consider such items if furnished by the agent on his individual responsibility was properly refused, where it was given in another instruction asked by plaintiffs; and a further instruction requested by them that if the goods were charged in the books of defendant to the persons who received the same, "then the presumptions are that defendant furnished the same to said parties on their own account, and not to the plaintiffs," was properly refused, because declaring to the jury a mere presumption of fact.

APPEAL from a judgment of the Superior Court of Modoc County and from an order denying a new trial. C. L. Clafin, Judge.

The facts are stated in the opinion.

Spencer & Raker, Clarence A. Raker, and D. H. Whittemore, for Appellants.

D. W. Jenks, for Respondent.

BRITT, C.—1. Plaintiffs sued to recover a balance of eight hundred and thirteen dollars and forty-two cents alleged to be due them upon a mutual and open account with defendant. They obtained a verdict and judgment for the sum of two hundred and eight dollars and six cents only; afterward, their motion for new trial was denied. They urge here that the verdict was not justified by the evidence; but the only specification of insufficiency in that respect contained in the statement on motion for new trial was this: "The evidence was insufficient for the jury to find that plaintiffs were only entitled to judgment for the sum of two hundred and eight dollars and six cents"; which was to say no more than that the verdict should have been for a larger sum, and was really no specification at all. Appellants assert that the specification "is all it could be," but we think they might at least have made it state, as they have stated in argument, what items of credit in their favor they deemed to be established without material conflict of evidence.

2. Near the close of the trial, which had continued, it seems, some eight days, plaintiffs applied for leave to file an amended complaint setting forth in addition to the items alleged in their original complaint various others said to have been proved in the

course of the evidence, and by which the balance in their favor was materially augmented; the court ordered that they have leave to amend in the more important particulars proposed on condition that a previous offer by defendant to allow judgment in a certain sum be deemed increased to correspond with the increased demand of the complaint; plaintiffs did not act on this suggestion, and complain now of the denial of their application. The matter was discretionary with the court, and we are unable to see that its discretion was abused.

3. A certain person was the agent of plaintiffs in a great part, if not all, of the transactions which gave rise to the suit; he was called by them as a witness and testified in their behalf at great length. When defendant opened his case he called as his first witness the said agent of plaintiffs and examined him as to a single item of credit claimed by defendant, his answers being unfavorable to the latter. Subsequently defendant introduced a quantity of testimony to the effect that said witness' general reputation for truth, honesty, and integrity was bad. (Code Civ. Proc., sec. 2051.) It is contended that such testimony was improperly admitted, and that defendant, by the examination of the witness in his own behalf, was precluded from impeaching his character. We are disposed to think this objection should have been sustained if it had been properly presented in the court below; but the only ground stated was that the testimony was 'incompetent, irrelevant, and immaterial'; the testimony was undoubtedly competent in the general sense, and only incompetent because of the fact that defendant had made the impeached witness his own; and this ground was not specified; the point of the exception was not "so stated as to be apparent to the court." (*Nightingale v. Scannell*, 18 Cal. 315, 323.) A like consideration applies to the further contention that the evidence was wrongly admitted because not confined to the general reputation of the impeached witness for truth, etc., in the community where he resided; the broad objection of incompetence and irrelevance did not reach the point; the general reputation of a witness necessarily includes repute in the place of his residence, and if it was desired to restrict the inquiry to that place the objection should have been stated accordingly. Lastly, under this head, it is said that the court erred in allowing the question

put to certain witnesses whether, on the general reputation for truth, etc., of plaintiffs' said agent, they would believe him under oath. The question was competent (*Stevens v. Irwin*, 12 Cal. 306); we see no substantial ground for the view advanced that the rule in this respect has been changed by the enactment of section 2051 of the Code of Civil Procedure.

4. Defendant's counsel proposed to make a formal offer of evidence; before he stated its purport plaintiffs objected that the offer should be in writing; the court overruled the objection, and in this we see no abuse of discretion. The offer was then made to show certain matters which, counsel claimed, went to prove that the action was not brought in good faith, but "to get the place of business where defendant was" by attaching his stock in trade. Plaintiffs made no objection to such proof, and the defendant, as a witness in his own behalf, gave testimony about the eligibility for business purposes of the building occupied by himself as contrasted with that of plaintiffs in the same town, and about some negotiation he had had with plaintiffs looking to a sale to them. Afterward he was asked what induced him to think the action was maliciously brought; an objection by plaintiffs was overruled, and he answered: "I thought they wanted my building." None of this evidence was proper; the issue was whether defendant owed plaintiffs as alleged by them, not what motives induced them to bring the action. But the answer of the witness to which plaintiffs objected was but his surmise based on previous testimony to which they did not object, and could not have prejudiced their case; that his answer was harmless appears the more clearly from the circumstance that in the course of his testimony he expressly admitted that he owed the plaintiffs something, and had refused to pay them before suit was brought.

5. The court refused an instruction asked by plaintiffs, the purpose of which, counsel say, was to allow recovery on various items of account not alleged in the complaint. We have seen that the court had refused leave to amend the complaint, so as to include those items, except on terms which plaintiffs failed to accept; it was therefore right to refuse to instruct in a manner to permit their recovery in the absence of amendment. The complaint contained an express averment that all of plaintiffs' charges against defendant were therein set forth, and we do not

see how they could recover on extraneous matters without amending the pleading.

6. Defendant claimed credit for goods furnished by him to sundry persons on the order of plaintiffs' agent; and a question in the case was whether, in issuing such orders, the agent represented the plaintiffs. There was evidence that some of the goods so furnished were charged by defendant directly to the persons who received them. Plaintiffs asked an instruction to the effect: 1. That the jury should not consider such items if furnished on the order of the agent acting on his individual responsibility; and 2. That if they found that defendant charged in his books the goods aforesaid to the persons who received the same, "then the presumptions are that defendant furnished the same to said parties on their own account, and not to the plaintiffs." The court refused the same as requested. The first proposition contained in this charge was given by the court in another instruction asked by plaintiffs, and of course it was not necessary to repeat it. The second was rightly refused because declaring to the jury a mere presumption of fact. (*Helwing v. Svea Ins. Co.*, 54 Cal. 156; 35 Am. Rep. 72.)

We find no material error in the record available to appellants. The judgment and order denying a new trial should be affirmed.

Chipman, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 533. Department Two.—September 10, 1897.]

J. W. REAY, Respondent, v. JOHN BUTLER et al., Defendants. THOMAS M. QUACKENBUSH et al., Appellants.

APPEAL—ORDER REFUSING TO STRIKE OUT COST BILL—UNAUTHORIZED STAY BOND—IMPROPER JUDGMENT UPON MOTION AGAINST SURETIES.—An order denying defendant's motion to strike out plaintiff's cost bill is not an "order directing the payment of money" within the purview of section 942 of the Code of Civil Procedure; and a bond executed in double the amount of the cost bill upon appeal from such order by the defendant, has no statutory authority, and cannot operate to stay execution; and the plaintiff is not entitled to judgment against the sureties thereon, upon motion, that being a summary remedy created by the statute, and applicable only to undertakings allowed by it.

ID.—STIPULATION FOR JUDGMENT UPON MOTION.—A stipulation inserted in such bond agreeing that judgment might be entered against the sureties upon motion, being required by the statute, in case of an effective stay bond, cannot operate to make the bond which is ineffectual as a stay, because made in a case not provided by statute, effective to bind the sureties to summary judgment against themselves.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Walter H. Levy, Judge.

The facts are stated in the opinion.

W. S. Goodfellow, for Appellants.

T. B. Mhoon, and W. W. Foote, for Respondent.

BRITT, C.—In this action a former judgment in favor of one Treadwell, intervenor, and against the plaintiff, Reay, was reversed on appeal to this court with costs to plaintiff. (*Reay v. Butler*, 69 Cal. 572.) In due time plaintiff filed his bill of costs with the clerk of the superior court, and the amount thereof was regularly entered in the docket. The executrix of said intervenor moved the court to strike out plaintiff's cost bill, and her motion was denied. Thereupon she appealed from the order denying her motion, and Quackenbush and Ames executed on her behalf an undertaking on appeal, which contained, among other provisions, the following: "And whereas the appellant is desirous of staying the execution of the said order, or execution

thereon, so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in double the amount named in said cost bill, and in said order, that if said order appealed from or any part thereof be affirmed, or the appeal dismissed, the appellant will pay the amount directed to be paid by the said order, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court judgment may be entered, on motion of the respondent, in his favor against the undersigned sureties, for the amount in said cost bill, together with interest," etc. The order refusing to strike out plaintiff's cost bill was affirmed (*Reay v. Butler*, 99 Cal. 477); and afterward, on motion of the plaintiff, judgment was entered against the said sureties pursuant to the terms of their said undertaking. From this judgment they prosecute the present appeal.

The bond in question is in the form and contains the stipulations prescribed by section 942 of the Code of Civil Procedure, to be given on the part of an appellant from "a judgment or order directing the payment of money," as the condition of staying execution of such judgment or order pending the appeal. No other section of the code regulating the practice on appeal provides for such a bond. Now, it seems plain to us that the order appealed from by the executrix was in no sense an "order directing the payment of money" within the purview of said section 942; it was in effect the denial of a motion to modify a judgment (*Dooly v. Norton*, 41 Cal. 439); any execution issued must have been founded on the judgment to which such motion was directed—not upon the order denying the motion. (Code Civ. Proc., secs. 958, 1034; *McMann v. Superior Court*, 74 Cal. 107, 108.) Therefore the bond of Quackenbush and Ames, so far as its effect is disclosed by the present record, could not operate to suspend execution; it was given without statutory authority or permission, and the plaintiff was not entitled to judgment against the sureties on motion—that being a summary remedy created by the statute (said section 942) and applicable only to undertakings allowed by it. (*Powers v. Chabot*, 93 Cal. 266; *McCallion v. Hibernia etc. Soc.*, 98 Cal. 442; *Central Lumber etc. Co. v. Center*, 107 Cal. 193.)

The point is made by respondent that the sureties ought not to be heard on this appeal, since by the express terms of their undertaking they agreed that judgment might be entered against them in case the order recited in such undertaking should be affirmed. Our inclination would be to recommend affirmance on this ground (*Erlanger v. Southern Pac. R. R. Co.*, 109 Cal. 395) if we could do so consistently with legal reason; but we reflect that the consent of the sureties to judgment on motion is a requirement of the statute allowing the bond, and, like the purpose of the bond as a measure to stay execution, rests for its efficacy on the statute alone; and as the bond is ineffectual as a stay because made in a case not provided by the statute, the consent of the sureties to summary judgment against themselves is likewise ineffectual; this aside from any question of technical consideration to support their undertaking. The judgment should be reversed.

Belcher, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed.

Temple, J., McFarland, J., Henshaw, J.

[S. F. No. 231. Department Two.—September 10, 1897.]

CHICO HIGH SCHOOL BOARD, Appellant, v. BOARD OF SUPERVISORS OF BUTTE COUNTY, Respondent.

HIGH SCHOOL—ESTIMATE OF BOARD FOR TAXATION—TAXING BODY—LARGER DISTRICT INCLUDING CITY—CONSTRUCTION OF MUNICIPAL ACT.—By the municipal act of 1893, in all municipal corporations, up to and including those of the fifth class, the legislature has sought to place the public schools, including high schools, within the cities and towns, under the government and control of the municipalities, with power to levy such taxes for their maintenance as may be necessary, in addition to the state tax; and by the amendment of 1891 to section 795 of that act, a school district, which includes a city and additional territory, is to be deemed part of the city, and the high school board in such a district, which includes a city of the fifth class, must report the estimate required by section 1670 of the Political Code, to the legislative authority of the city, as the proper

taxing body to levy a special tax for high school purposes, and not to the board of supervisors of the county.

APPEAL from a judgment of the Superior Court of Butte County. W. H. Grant, presiding.

The facts are stated in the opinion.

F. C. Lusk, for Appellant.

Warren Sexton, and Park Henshaw, for Respondent.

SEARLS, C.—Application by the Chico high school board for a writ of mandate commanding the board of supervisors of the county of Butte to hold a special meeting and to levy a special tax upon all the taxable property of Chico high school district, sufficient in amount to raise the sums required by said Chico high school district, as shown by the estimates of the Chico high school board, etc.

An alternative writ issued, whereupon the board of supervisors came in and filed a demurrer to the petition upon the ground that it did not state facts sufficient to constitute a cause of action.

The demurrer was sustained by the court, and, petitioners declining to amend, judgment went for defendant. Plaintiff appeals.

The petition shows, among other things, that "the Chico high school district" is a municipal corporation in the county of Butte, regularly organized and existing under the provisions of section 1670 of the Political Code, relating to high schools, as amended in 1895. The district embraces within its exterior boundaries the entire area of the city of Chico, a municipal corporation of the fifth class, which contains about three hundred and twenty acres of land, and taxable property to the extent of about one million three hundred thousand dollars.

The high school district also includes within its exterior limits a large extent of country outside of the city of Chico, which, together with that within the city, consists of about twenty thousand three hundred and fifty acres, and contains taxable property of the value of say two million eight hundred and twenty-five thousand four hundred and twenty-five dollars.

The boundaries of the high school district and of Chico school district are identical, the latter having been regularly formed as by law provided, and the former having been regularly formed by the qualified electors of the Chico (common) school district.

The board of education of the city of Chico constitutes the Chico high school board, and its members are elected by the voters of the whole district. The appellant in this action is the high school board.

At a meeting of the board held prior to August 31, 1896, it was decided to expend the sum of seven thousand five hundred dollars to purchase block 81, in the city of Chico, for a high school lot, and to repair the building thereon for a schoolhouse, and to furnish the same for the accommodation of a school. It was also decided to expend the sum of three thousand five hundred dollars for conducting the said Chico high school for the school year, and it was decided and directed that an estimate in accordance therewith be presented to the defendants, the supervisors of Butte county.

Thereupon, on the thirty-first day of August, 1896, a written estimate was duly presented to the board of supervisors, as provided by subdivision 14 of section 1670 of the Political Code, setting forth separately the amounts required for said several purposes, the action of the high school board relating thereto, etc., with a request that the board of supervisors levy a special tax upon all the taxable property of said Chico high school district sufficient in amount to raise the said several sums required by said Chico high school board, as shown by said estimates.

The board of supervisors considered the application, estimates, etc., and refused to levy the special tax or any special tax to raise the said sums of money or any part thereof. The petitioners are residents and taxpayers of said high school district.

No objection is suggested as to the validity or regularity of the formation of the Chico high school district, or as to the regularity of the estimates or application for the levy of the tax, or that appellant is the high school board of this high school district.

The paramount question involved in the case is this: Was it the duty of the board of supervisors of Butte county to levy the school tax for the support of the Chico high school district, or

did that duty devolve upon the board of trustees of the city of Chico?

The haze in which this question is enveloped comes from the wording of the various statutes bearing upon the question.

Subdivision 14 of section 1670 of the Political Code, as amended in 1895 (Stats. 1895, p. 293), which was in force when the proceedings herein were taken, provides that: "In any city, incorporated town, school district, or union high school district, which shall have voted to establish and maintain a high school, it shall be the duty of the high school board therein to furnish to the authorities whose duty it is to levy taxes, on or before the first day of September, an estimate of the cost of purchasing a suitable lot, of procuring plans and specifications and erecting a suitable building, of furnishing the same, and of fencing and ornamenting the grounds for the accommodation of the school, and of conducting the school for the school year.

"It shall be the duty of said board, each and every year thereafter, to present to said authorities, on or before the first day of September, an estimate of the amount of money required for conducting the school for the school year."

The fifteenth subdivision of the same section (1670) is as follows:

"When such estimate shall have been made and submitted, it shall be the duty of the authorities whose duty it is to levy taxes in said city, incorporated town, school district, or union high school district, to levy a special tax upon all of the taxable property of said city, incorporated town, school district, or union high school district, sufficient in amount to maintain the high school. Said tax shall be computed, entered upon the tax-roll, and collected in the same manner as other taxes are computed, entered, and collected."

The sixteenth subdivision provides that if the high school board shall fail to make the estimate provided for in subdivision 14, the superintendent of schools shall, on petition, make it; and subdivision 17 provides as follows:

"Should the authorities whose duty it is to levy the tax, as provided in subdivision 15 of this section, fail to make the levy provided for, it shall be the duty of the county auditor to make

such levy and add it to the tax-roll of said city, incorporated town, school district, or union high school district."

The crucial question, then, is as to what board or body is meant by the expression "the authorities whose duty it is to levy taxes in said city, incorporated town, school district, or union high school district."

The learned counsel for appellant contends and argues at length in favor of the proposition that the duty devolves upon the board of supervisors of the county of Butte. Counsel for respondent holds that the levy, under section 1670, quoted *supra*, should have been made by the trustees of the city of Chico.

Section 6 of article IX of our constitution provides that "the public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools, and technical schools as may be established by the legislature or by municipal or district authority; but the entire revenue derived from the state school fund and the state school tax shall be applied exclusively to the support of primary and grammar schools."

It will be seen from this constitutional provision that, while "high schools" are an integral part of our public school system, the expense of their maintenance is to be met by necessary taxation independent of the general school tax and of the revenue derived from the state school fund.

We think it apparent from the language used in section 1670 of the statute as amended in 1895, quoted *supra*, that the legislature comprehended that the duty of levying taxes for the support of high schools would, under different circumstances, devolve upon different boards or authorities, hence the high school board is required to furnish estimates of the amount of money required "to the authorities whose duty it is to levy taxes."

This is made more apparent when we bear in mind that the statute of 1895 provides for the creation of high schools: 1. In cities or incorporated towns; 2. In school districts; 3. In two or more contiguous school districts in the same county; 4. County high schools embracing the whole of the county, not, however, to include any city, incorporated town, or school district in which a high school is in existence; 5. Joint union high schools composed of two or more adjacent districts not in the same county.

As to the county high schools, the statute of 1895, in express terms, imposes the duty of levying taxes for their support upon the boards of supervisors of the respective counties in which they are situate. (Stats. 1895, p. 301.) So, too, in the case of high schools organized in school districts not situate in an incorporated city or town, it is conceded the power of taxation for their support rests in the board of supervisors, under the general powers conferred by the County Government Act.

"A municipal corporation is but a branch of the state government, and is established for the purpose of aiding the legislature in making provision for the wants and welfare of the public within the territory for which it is organized, and it is for the legislature to determine the extent to which it will confer upon such corporation any power to aid it in the discharge of the obligation which the constitution has imposed upon itself." (*In re Wetmore*, 99 Cal. 146.)

To promote the education of the rising generation is one of the obligations which, by article IX, section 1, of the constitution, devolves upon the legislature. In the discharge of this obligation the legislature, by the municipal act of 1883 organizing municipal corporations (Stats. 1883, p. 93), has created in the first five of the several classes of municipal corporations school departments.

In class five, of which the city of Chico is one, the legislative department of the city is authorized to "levy and collect annually a property tax which shall be apportioned as follows, . . . for school fund, not exceeding twenty cents on each one hundred dollars. (Stats. 1883, sec. 764, subd. 9, p. 253.)

By section 795 of the same act each of those municipal corporations is made a school district "which shall be governed by the board of education of such city." Full power is given to the board of education to establish and maintain public schools, to build, rent, purchase, and furnish schoolhouses, etc., and to determine and report annually the amount of money needed for the support of the public schools, etc., to the city trustees, who shall thereupon levy a tax, etc.

These references to the municipal act of 1883 are for the purpose of showing that in all municipal corporations up to and including those of the fifth class, the legislature has sought to

place the public schools within the cities and towns under the government and control of the municipalities, with power to levy such taxes for their maintenance as may be necessary in addition to the state tax, etc.

The act of 1883 has been repeatedly amended, but we fail to find in any of the changes an attempt to deprive municipal corporations, of the classes indicated, of the powers therein designated. They have been enlarged, modified, etc., but have not been taken away.

By an amendment made in 1891 to section 795 (Stats. 1891, p. 28), it is provided that the supervisors may include in the school district more territory than is included in the city, in which case the added territory is to be deemed a part of the city, and shall constitute a separate precinct for the purposes of municipal elections, and the electors therein may vote for the board of education, and such outside territory shall be deemed a part of the city for all matters connected with the school department "and the annual levying and collecting of the property tax for the school fund."

The Chico school district comes within the category of cases provided for by this amendment.

If the legislature had intended or understood that the boards of supervisors of the several counties should in all cases levy the tax for high school purposes, it is hard to suppose that they would have so declared expressly in cases of county high schools, and then used the expression found in the fourteenth and fifteenth subdivisions of section 1670, as amended in 1895, viz: "The authorities whose duty it is to levy taxes in said city, incorporated town, school district, or union high school district," for the reason that the expression quoted would have been surplusage.

But when we bear in mind that the authority to levy taxes for school purposes is expressly conferred upon the first five classes of municipal corporations, and that the sixth class has no such authority conferred upon it, and is not provided as are the others with a school department, the object becomes apparent. The legislature could not with propriety direct the high school board in all incorporated cities to report the amount needed for high school purposes to the city trustees, as that would include cities

of the sixth class which are school districts and may become high school districts equally with the others, but have no power to levy school taxes; hence the expression "the authorities whose duty it is to levy taxes." The term "duty to levy taxes" must be construed to mean the duty to levy taxes for school purposes.

We have found it difficult to harmonize all the different clauses relating to the school system so as to give effect to the whole, and were we inclined to cavil, abundant cause might be found therefor in some of our school legislation.

We conclude, however, after a patient study of the school law as it now stands, that in cities and incorporated towns of the first five classes the high school boards should report their estimates for high school support to the city trustees or other legislative authority; and that in all other cases, including cities of the sixth class, the estimate should be presented to the board of supervisors of the county or counties in which the high school is situated. These views are conclusive of appellant's right in the premises.

As the estimates were presented to the board of supervisors and a demand made for the levy of the tax by that body, when it should have been made to the board of trustees of the city of Chico, the court below properly sustained the demurrer to the petition, and the judgment should be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Harrison, J., McFarland, J., Henshaw, J., Temple, J.

[S. F. No. 530. Department Two.—September 10, 1897.]

PACIFIC ROLLING MILL COMPANY, Appellant, v. W. D.
ENGLISH et al., Respondents.

CONTRACT TO CONSTRUCT SEAWALL—SUBCONTRACT—RESERVED PERCENTAGE—
ORDER UPON HARBOR COMMISSIONERS—CONDITION PRECEDENT—ABANDON-
MENT OF WORK—COMPLETION BY CONTRACTOR—RIGHTS OF ASSIGNEE.—

Where one who had contracted with the state board of harbor commissioners to construct part of the sea-wall, made a subcontract, agreeing that a residue of twenty-five per cent of the subcontract price was to be paid by an order drawn upon the harbor commissioners, to be held by a third person until the work was completed and accepted by them, and delivered to the subcontractor only on the faithful performance of the subcontract, and, if it was not performed as therein specified, the order was to be forfeited and returned to the contractor, who might complete the work at the expense of the subcontractor, the completion and acceptance of the work is a condition precedent to the payment of the reserved percentage, and upon abandonment of the work by the contracting company which made the subcontract before its final completion, it is not entitled to the order, or the money which it represents, and its assignee is in no better position, and is only entitled to such portion of the reserved percentage as might remain after deducting the expense incurred by the contractor in completing the work specified in the subcontract, and an assignee of that portion of the reserved percentage covered by such expense, acquires nothing by the assignment.

1D.—CONSENT OF CONTRACTOR TO ASSIGNMENT OF RESERVED PERCENTAGE—
CONDITIONS—SUBCONTRACT NOT MODIFIED.—The written consent of the contractor to the assignment by the subcontractor of the reserved percentage, which is given expressly subject to the terms and conditions of the subcontract, and to the completion of the contract according to the terms and conditions thereof, works no modification of the subcontract, and does not circumscribe the rights of the contractor, in case of a violation of the terms of the subcontract by the assignor; and the assignee takes the assignment *cum onera*.

1D.—LOSSES OF CONTRACTOR IN COMPLETING SUBCONTRACT—CONFLICTING EVIDENCE—APPEAL.—Where the evidence is conflicting as to what losses were sustained by the contractor in completing the work specified in the subcontract upon abandonment thereof by the subcontractor, a new trial cannot be granted for failure of the evidence to support the findings as to the losses so sustained.

1D.—AMOUNT OF LOSS—VALUE OF LABOR—EXPERT EVIDENCE—STRIKING OUT EVIDENCE FOR APPELLANT—HARMLESS RULING.—In an action by an assignee of the reserved percentage, where expert evidence was given for the defendant to show the value of certain labor charged for by the contractor in performing work which the subcontractor had covenanted but failed to perform, and experts testified for plaintiff in

rebuttal that the labor was of considerably less value, the striking out such rebutting evidence is harmless, where it appears that if the lowest value testified to were accepted, the amount of loss of the contractor would still be largely in excess of all that portion of the reserved percentage assigned to plaintiff.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion.

T. Z. Blakeman, for Appellant.

William H. Jordan, for Respondents.

SEARLS, C.—This action was brought by the plaintiff, a corporation, to have the defendants, the state board of harbor commissioners, adjudged and directed to draw their draft on the harbor fund, in favor of the plaintiff, for the sum of \$4,607.12, and to ascertain and determine to which of the other defendants the balance of a fund of \$28,084.12 belongs, and to have drafts in their favor therefor; to have the Kennedy & Shaw Lumber Company, a corporation, a defendant herein, restrained and enjoined from prosecuting a writ of mandate against said state board of harbor commissioners for the recovery of said sum of money, etc., and to restrain the said harbor commissioners from drawing drafts for any portion of said sum until the further order of the court.

The other defendants are the San Francisco Contracting Company, a corporation, L. B. Doe, J. S. Antonelli, J. W. Taylor, W. S. Somervell, and C. D. Vincent.

The cause was tried by the court without the intervention of a jury, and upon the findings of the court judgment was entered, whereby it was adjudged that neither plaintiff nor the defendants, J. W. Taylor and W. S. Somervell, take anything by the action; that the sum or fund in question of \$28,084.12 be divided as follows: \$308 and interest, etc., to defendant C. D. Vincent, and the residue thereof to the defendant, the Kennedy & Shaw Lumber Company, with costs, etc.

Plaintiff appeals from the judgment and from an order denying its motion for a new trial.

As the judgment was entered between two and three years prior to the attempted appeal therefrom, we need not notice it further, and may confine our inquiry to the order denying a new trial.

The facts essential to an understanding of the case are, that on the twenty-fifth day of October, 1888, the board of state harbor commissioners, consisting at that time of W. D. English, A. C. Paulsell, and Charles O. Alexander, entered into a contract with defendant J. S. Antonelli for the construction by the said Antonelli of section 8b, of the seawall along the waterfront and wharves of the harbor of San Francisco, said seawall to be constructed according to and in conformity with certain plans and specifications submitted and executed by the parties.

By the terms of the contract Antonelli was to furnish the labor and materials, and to be paid as follows, to wit, seventy-five (75) per cent monthly upon estimates thereof to be made by the chief engineer of said board, and the balance of twenty-five (25) per cent to be retained by said board until the completion of the work according to the plans and specifications; and until the acceptance of the work and its maintenance for three months thereafter.

On the first day of November, 1888, defendant Antonelli entered into an agreement or subcontract with the defendant, San Francisco Contracting Company, a corporation, whereby the said contracting company agreed with Antonelli to perform certain portions of the work and to furnish certain portions of the materials provided for in the original contract, to wit, to furnish the piles, lumber, and other materials necessary to drive and cap the same; put the platform on top thereof ready to receive concrete and sand in accordance with the plans and specifications of the chief engineer, etc. All of said work to be done and completed in accordance with said plans and specifications, and said contracting company to furnish everything necessary therefor to complete said work of piling and planking. Antonelli agreed to pay the contracting company \$53,000 for said work and materials when so furnished and done in accordance with the contract. The contracting company was also to furnish and fill in, on top of the planking and below, all the sand and rock called for by the specifications for 30 cents per cubic yard; to furnish and place the rock for the stone foot wall outside the concrete for 80

cents per ton; and to protect the north end of the embankment, as set forth in the plans and specifications, by a bulkhead, free of charge.

The contracting company also agreed to furnish and deliver the rock required for concrete ready for use for \$1.25 per cubic yard, and, in case a floating caisson should be used instead of a cofferdam in the construction of the seawall, the contracting company was to furnish the iron and lumber for the bottom of said caisson, and the labor necessary in building thereof (except the calking), and to fasten the caisson in place when sunk by Antonelli. Antonelli was to pay the contracting company as follows:

Seventy-five (75) per cent monthly on the estimates of the chief engineer of the board of harbor commissioners, "the balance of twenty-five (25) per cent said Antonelli agreed to pay by an order drawn upon said board of state harbor commissioners in favor of John F. Kennedy, to be by him held until the completion of said contract and the acceptance of said work by the said board of state harbor commissioners, but only on the faithful performance of said contract by the said San Francisco Contracting Company."

The plans and specifications prepared by the harbor commission were made a part of the contract, and if the contracting company failed to perform the contract as therein specified, and if Antonelli had to complete the work, the orders so to be delivered to Kennedy were to be forfeited and returned to said Antonelli; and, if the company failed to perform, Antonelli might proceed with the work at the expense of the contracting company.

All the conditions of the original contract of Antonelli with the state board of harbor commissioners were to be considered a part of the contract.

The contracting company entered upon the work and pursued it until in January, 1890, when it abandoned it and thereafter failed and refused to complete the same. It had received pay to the extent of seventy-five per cent of the estimates, and the twenty-five per cent of the value of the work done at the time of the abandonment of the contract, which was kept and retained by the harbor commissioners under the contract as security, etc., amounted to the sum of \$11,887.73 (which, with the exception of

\$4,170.12, had been assigned to the Kennedy & Shaw Lumber Company). Antonelli assigned to Antonelli & Doe, who completed the contracting company's contract at a loss of \$4,834.80, over and above what they received or were entitled to receive on the original contract.

On December 23, 1889, the contracting company assigned to plaintiff herein its interest present and future in the twenty-five per cent due or to become due it under said contract with Antonelli, except such portions thereof as it had previously assigned to the Kennedy & Shaw Lumber Company.

The amount then unpaid on account of said twenty-five per cent was \$4,170.12, and thereafter a further sum of about \$500 was retained by the harbor commission as twenty-five per cent of the value of work subsequently done by the contracting company, under its said contract with Antonelli. Antonelli consented in writing to the assignment by the contracting company to plaintiff.

The board of state harbor commissioners had notice of the contract between Antonelli and the contracting company, and that the latter was performing labor, etc., thereunder, but never consented thereto, and looked solely to Antonelli to perform his contract with said board. The work under the contract and sub-contract was all done, and said section 8b was accepted by the harbor commissioners September 4, 1890, and had been maintained for a period of three months prior to the commencement of this action, and the entire twenty-five per cent due under the original contract amounting to \$28,084.12 was due, but the court finds there was nothing due to plaintiff under the assignment to it by the contracting company; that the San Francisco Contract Company did not earn the sum of \$4,670.12, or any other sum which was not paid to it, and did not complete its contract.

Antonelli and the firm of Antonelli & Doe assigned to the "Kennedy & Shaw Lumber Company" the said sum of \$28,084.12 in consideration of an indebtedness to it by them of a sum in excess thereof.

The Kennedy & Shaw Lumber Company had no notice of the assignment to plaintiff and never consented thereto. The foregoing facts seem to contain sufficient of the findings to elucidate

the case so far as appellant is concerned, and we omit the residue, subject to reference to them should it appear necessary in the consideration of the case.

The vital question in the case relates to the rights of the parties, Antonelli and the San Francisco Contracting Company, to the twenty-five per cent reserved under their contract until the work was completed.

The contract and findings both show that an order upon the board of state harbor commissioners was to be drawn in favor of John F. Kennedy and delivered to him, to be held until the contract was completed and the work accepted by the board of state harbor commissioners, and in case of the failure of party of the second part to complete the contract, and in case Antonelli had to complete it, the order was to be forfeited and returned to Antonelli, who might proceed with the work at the expense of the party of the second part, the San Francisco Contracting Company. The party of the second part did abandon and fail to complete the contract. The order was to be delivered upon the completion of the contract. Completed by whom? Manifestly by the contracting company, for if it did not complete it the order was to be delivered up to Antonelli.

The completion and acceptance of the work was a condition precedent to the payment of the twenty-five per cent, or, what is the same thing, the delivery of the order on the harbor commissioners.

As the contracting company was not entitled to the order or the money which it represented, its assignee, the plaintiff herein, is in no better position. Neither were entitled to the order, or the fund against which it was drawn, until the contract was completed, and under that clause of the contract which authorized Antonelli, in case of failure by the contracting company so to do, to complete the contract at its expense, the contracting company or its assignee was only entitled to such residue of the contract price as remained after deducting the expense incurred by Antonelli or his assignee in its completion. This was the theory upon which the court below proceeded.

Of the \$11,887.73 constituting the reserved percentage at the time the subcontract was abandoned, \$7,474.73 was assigned by the contract company to the Kennedy & Shaw Lumber Com-

pany by orders drawn upon Antonelli and Doe, assignees of Antonelli, and accepted as follows:

"Accepted and payable at completion of and acceptance of contract of S. F. C. Co."

(Signed) "ANTONELLI & DOE."

The residue of this reserved percentage and \$4,834.80 in addition thereto was expended by Antonelli & Doe in completing the work on the subcontract.

Again, it is claimed by appellant that Antonelli, by consenting to the assignment of the residue of the net reserve to plaintiff herein, waived and lost any right which he might otherwise have had thereto. The assignment was dated December 23, 1889; described the contract in succinct terms and by reference thereto, etc. Antonelli by his attorney in fact assented thereto in the following language:

"San Francisco, Dec. 23, 1889.

"I hereby consent to the foregoing assignment of the net reserve percentage so called, retained by me under and by virtue of said contract referred to and subject to the terms and conditions of said contract, and on completion of said contract according to terms and conditions thereof. I hereby agree to give to the holder of the foregoing assignment such order or orders on the board of state harbor commissioners as will enable said holder to draw from said board the amount of said net reserve percentage.

J. S. ANTONELLI.

"By L. B. Doe, Attorney in Fact."

This was a consent to the assignment, but it was "subject to the terms and conditions of said contract," and it was only "on completion of said contract according to terms and conditions thereof" that Antonelli agreed to give an order or orders on the board of state harbor commissioners for the amount of the net reserve percentage. In other words, he agreed to do just what under the contract he was bound to do, and nothing more. Such an agreement worked no modification of the contract, and did not circumscribe the rights of Antonelli in case of a violation of the terms of the contract by the assignor. Appellants took the assignment *cum onere*.

2. But appellant urges that the findings of the court as to the losses sustained by Antonelli and his assignees in completing the contract are not supported by the evidence. We have given this branch of the case careful attention, but, after a review of the evidence, we are unable to say that under the well-established rules laid down by this court for its guidance in passing upon contradictory evidence a new trial should be granted for that cause.

3. Appellant also contends that the court below erred in striking out the testimony of experts produced by appellant.

The testimony of these experts, two in number, related to the charge for labor in putting together the bottoms of seven caissons, which appellant's assignor had covenanted to construct but had failed to do. L. B. Doe, on behalf of the Kennedy & Shaw Company, had testified that the value of such labor was \$16 per thousand feet of lumber used in the bottoms. In rebuttal of this charge appellant introduced two experts, one of whom placed the value of such labor at \$6 to \$8 and the other at \$10 per thousand feet of lumber. This testimony was stricken out by the court.

We need not discuss the propriety of this action by the court, for the reason that if error it does not call for reversal.

The testimony showed that these caissons were 14x70 feet, with bottoms twenty inches thick. This would give 19,600 feet of lumber in each of the bottoms. At \$16 per thousand feet the value of the labor in each would be \$313.60, or \$2,195.20 for the whole seven.

At the lowest price fixed by appellant's experts, viz., \$6 per thousand feet, the value of the same labor would be \$117.60 per bottom, or \$823.20 for the whole, a difference of \$1,372. Deduct this last sum from \$4,834.80, the sum lost by Antonelli & Doe, and found by the court over and above all they received or were entitled to receive, and we still have a loss on their part of \$3,462.80, for which they received no compensation. It follows that, conceding it was error to strike out the expert testimony, appellant was not injured thereby.

One of the caissons was smaller by several feet than the others, but as it would not, if all the labor on its bottom were stricken out, alter the result, we have not noticed it more particularly.

We are of opinion the judgment and order appealed from should be affirmed.

In reaching this conclusion we have assumed without deciding that plaintiff could properly bring and maintain this action upon an assignment of a part only of an entire demand.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 281. Department Two.—September 10, 1897.]

GRANITE GOLD MINING COMPANY, Respondent, v. S. H. MAGINNESS et al., Appellants.

EVIDENCE—ADMISSIONS—EXPLANATORY EVIDENCE—PLEADINGS.—The general rule that an entire admission is to be taken together, in order to enable the court or jury to judge of its true extent, does not extend to receiving the whole of what was said by the party making the admission, but only such other or further part of what was said as would in any way explain or qualify the part first given in evidence; and this is the true rule applicable to admissions in pleadings under our codes.

ID.—ADMISSION OF ANSWER—EJECTMENT FOR MINING CLAIM—TITLE OF CORPORATION PLAINTIFF—EXPLANATORY EVIDENCE—AVERMENT OF DEFENDANT'S TITLE—NONSUIT.—In an action of ejectment brought by a mining corporation to recover a mining claim, where the plaintiff offered in evidence, in support of its title, an averment of the answer that, at a time specified, title to the mining ground in controversy was vested in a person named, and that, under a contract and certain mesne conveyances, the legal title thus vested passed to and vested in the plaintiff, only so much of the answer as is explanatory of such admission or may qualify it, is proper evidence for defendants, and not the entire answer, and where defendants read the whole remainder of the answer, which averred a legal and equitable title in the defendants at the beginning of the action, such averment is not binding upon the plaintiff, and the defendants are not entitled to a nonsuit upon the ground that plaintiff offered no evidence in rebuttal of the alleged title of the defendants.

CORPORATIONS—GENERAL POWER TO PURCHASE—PRESUMPTION—BURDEN OF PROOF AS TO EXCEPTION.—Every corporation is presumed to have power to purchase and hold real estate, and if there is anything in its charter, or the business in which it is engaged, or the law under which

it is organized, abridging this power, it must be shown affirmatively by the person assailing its title, else a conveyance to it will be deemed valid.

Id.—PURCHASE OF MINING CLAIM BY MINING CORPORATION—ASSENT OF STOCKHOLDERS—CONSTRUCTION OF STATUTE—"ADDITIONAL MINING GROUND"—PROOF REQUIRED.—The general presumption of the power of corporations to buy and sell real property must prevail in case of a mining corporation, except in those cases where the facts appearing of record show affirmatively that the case is one within the restrictions of the act of April 23, 1880, for the further protection of stockholders in mining companies; and where a mining corporation purchases a mining claim, formal assent of the stockholders is not required in order to the validity of the conveyance to it, unless it affirmatively appears that the corporation already has mining ground prior to the purchase and that the purchase is of "additional mining ground."

Id.—CONVEYANCE AT ORGANIZATION OF MINING CORPORATION—CONSIDERATION FOR STOCK.—Where it appears that a conveyance of a mining claim was made to a mining corporation at the time of its organization, in consideration of the issuance of its stock to the grantors in the conveyance, it is to be inferred that the corporation then owned no other mining ground, and that the conveyance is valid without formal action of the stockholders.

APPEAL from a judgment of the Superior Court of El Dorado County. M. P. Bennett, Judge.

The facts are stated in the opinion.

Williams & Witmer, for Appellants.

Irwin & Irwin, for Respondent.

SEARLS, C.—Action of ejectment to recover a mining claim situate in Smith's Flat mining district, county of El Dorado, state of California.

Defendant S. H. Maginness answered separately and filed a cross-complaint. Plaintiff had judgment for an undivided one-half (½) of the demanded premises. Defendant Maginness appeals from the judgment.

Plaintiff is a mining corporation, organized under the laws of the state of California on the nineteenth day of June, 1894, and having its principal place of business at Sacramento in said state.

The objects of the corporation, as specified in its articles, are declared to be, "to buy, own, hold, construct, lease, bond, mortgage, and hypothecate mines and mining claims and mining property of every kind, . . . and generally to carry on the business of mining in all its branches," etc.

At the trial, plaintiff, after introducing in evidence its articles of incorporation, and for the purpose of making its case, offered in evidence certain portions of the answer of defendant Maginness setting up an equitable defense, in which answer said defendant averred that title to the ground described in the complaint at a time therein specified was vested in one Thomas Potts, Sr.; that under and pursuant to a contract and sundry mesne conveyances the legal title thus vested in said Potts passed to and vested in the plaintiff herein.

Defendant Maginness objected to the admission of any portion of the answer in evidence on the ground of its incompetency, and further objected to portions of the answer being admitted without the balance thereof being read and admitted in evidence.

The court ruled that the portions of the answer offered by plaintiff were admissible, and they were admitted; but the court also held that the remainder of the answer, on the demand of the defendant, must be read and admitted in evidence in connection with the portions offered and admitted on behalf of the plaintiff. Counsel for plaintiff excepted to the ruling of the court admitting those portions of the answer not offered by plaintiff. The whole answer setting up an equitable defense was then read in evidence. It is sufficient to say that, taken as a whole, it showed, if treated as true in all its parts, a legal and equitable title in defendant Maginness to the land in controversy.

Plaintiff also offered in evidence a patent to the land in question from the government of the United States to the persons therein named as grantees, and sundry mesne conveyances from said grantees through which the title vested in plaintiff.

The last of said conveyances was one from G. W. Cummings and Kate L. S. Cummings to plaintiff, dated June 19, 1894, whereby the grantors therein granted the land in dispute to said plaintiff. Counsel for defendant Maginness objected to the introduction of the deed in evidence upon the grounds: 1. That it does not appear that said G. W. and Kate L. S. Cummings had title to the property at the date of the conveyance, and that it does appear from the evidence of plaintiff that the title had passed to defendant Maginness prior to the execution of said deed; 2. "That it does not appear that any or two-thirds of the stockholders of the plaintiff consented to said deed and purchase, or ever ratified the same."

The objection was overruled and the deed admitted in evidence, to which ruling of the court counsel for the defendant excepted.

Plaintiff then rested its case, whereupon counsel for defendant Maginness moved for a nonsuit upon the grounds substantially: 1. That plaintiff had not shown title or right to possession at the time of suit brought to the premises described in the complaint, and that the evidence of plaintiff showed that at the date of suit brought title to the property was vested in defendant Maginness; 2. That plaintiff claims title under a deed of grant, bargain, and sale from Kate L. S. Cummings and George W. Cummings, dated June 19, 1894, etc., and that it does not appear that at the time of the execution of the deed the trustees of the plaintiff were authorized by the stockholders or two-thirds of the stockholders, to make the purchase, or that the stockholders, or two-thirds of them, ratified the deed at any time subsequent to its execution.

The court overruled the motion for a nonsuit, and this action by the court constitutes the error assigned on this appeal.

The substance of the contention of appellant, under the first point made in favor of the nonsuit, is, that the whole answer of the defendant having been admitted in evidence, the facts therein stated must be considered the same as if admitted in open court by both parties, and as such answer averred title in defendant, which was not explained or contradicted by other evidence offered by plaintiff, defendant was entitled to a nonsuit.

We think the general rule is well established that an entire admission is to be taken together. This is essential to enable the court or jury to judge of the true extent of the admission, which when taken entire will often have a different import from that which a partial account might convey. (*Trammell v. Bassett*, 24 Ark. 499; *Barnes v. Allen*, 1 Abb. App. 111; *Searles v. Thompson*, 18 Minn. 316; *People v. Murphy*, 39 Cal. 52; *Barry v. Davis*, 33 Mich. 515.)

In the *Queen's case*, 2 Brod. & B. 297, 298, Abbott, C. J., in delivering the opinion of the court, went to the extreme length of saying: "The conversations of a party to the suits are in themselves evidence against him in the suit, and, if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before

the court the whole which was said by his client in the same conversation, and not only so much as may explain or qualify the matter introduced by the previous examination, provided only that it relate to the subject matter of the suit, because it would not be just to take a part of a conversation as evidence against a party without giving to the party at the time the benefit of the entire residue of what he said on this occasion."

Starkie adopted the foregoing rule in his work on Evidence. (Starkie on Evidence, 2d ed., 180.)

In *Prince v. Samo*, 7 Ad. & E. 627, Lord Denman, C. J., criticised the rule as enunciated in *Queen's case*, *supra*, and adopted by Starkie, and denied its authority to the extent which it went. He stated the rule to be that, where part of a conversation had been given in evidence, any other or further part of the conversation might be given in evidence in reply, which would in any way explain or qualify the part first given in evidence.

We think the rule as stated by Denman, C. J., the true one to apply to admissions in pleadings under our codes.

To illustrate: A brings an action against B, the maker of a promissory note; B admits making the note, and pleads accord and satisfaction, payment, etc. At the trial A reads the admission in the answer to avoid the necessity of proving the making of the note, and rests. To hold that this admits the whole answer and is proof of every issuable fact stated in the answer, and in nowise qualifying the admission as to making the note, seems to us as absurd.

Such a rule would antagonize the whole theory of our system of code pleading, under which a fact admitted or alleged in the complaint and not denied by the answer is to be taken as true.

To call the attention of the court to such admission, or failure to deny a material fact alleged, it is necessary to read it. For that purpose it is evidence. All other issuable facts set up in the answer are to be deemed in law as denied, and it is only those other statements in the pleading which go to qualify the admission that are to be taken as a part of the evidence under such circumstances. Section 1854 of our Code of Civil Procedure fixes the rule in this state. It is as follows:

"When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject

may be inquired into by the other; when a letter is read the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

When the plaintiff offered in evidence so much of the answer of defendant as averred the execution of certain deeds of conveyance, it entitled the defendant to read as evidence in the case every fact averred in his answer going to explain, modify, or qualify the averments made evidence by the plaintiff, and, as the cause was tried by the court, it may have been proper to permit the whole answer to be read, to the end of determining whether or not any such explanations or qualifications were contained therein, but this did not have the effect of making the whole answer conclusive evidence in the case.

In *Loftus v. Fischer*, 113 Cal. 288, 289, a portion of a verified complaint in another action was admitted in evidence on behalf of the defendant.

Plaintiff's counsel thereupon offered in evidence all of that complaint, as was said "to explain the portion admitted." The court, in excluding the whole complaint, said: "If there is any portion that the other side [plaintiff] think will show how or why that was [the admission], it is admissible." Plaintiff on appeal contended that the whole complaint should have been admitted. This court dismissed the question as follows:

"The mere statement of the facts shows the unsoundness of the claim."

Plaintiff afterward offered in evidence all the deeds in the chain of title, in view of which the answer and its statements were of little importance to it, but this fact does not alter the importance of the question made by appellant.

We are of opinion the court did not err in refusing the non-suit upon the ground we have considered.

2. The more formidable question in the case relates to the admission of the deed in evidence from Cummings and Cummings to the corporation plaintiff without proof of the consent or ratification of stockholders, as required by the act of April 23, 1880, entitled, "An act for the further protection of stockholders in

mining companies." (Stats. 1880, p. 131.) The first section of that act is as follows:

"It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain, in any way, additional mining ground, unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation.

"Such ratification may be made either in writing, signed and acknowledged by such stockholders, or by resolution duly passed at a stockholders' meeting called for that purpose."

In *McShane v. Carter*, 80 Cal. 310, it was held that the act of 1880, quoted above, goes to the power or authority of the directors of a mining corporation, and that without the consent or subsequent ratification by the holders of two-thirds of the stock of the corporation a conveyance of the "mining ground" of such corporation by the directors did not pass the title, and that "the question can be raised by one who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof."

In *Pekin Min. etc. Co. v. Kennedy*, 81 Cal. 356, it was held that a conveyance of the real property of a mining corporation under its corporate seal, which is not proved to have been ratified by the holders of two-thirds of its capital stock as provided by section 1 of the act of April 23, 1880, concerning mining corporations, does not pass title to the grantee, and will not sustain an action of ejectment by such grantee for the land described in the deed, as against third parties without title. It will be observed the cases cited both related to conveyances by the corporation which were not consented to or ratified by the stockholders as provided by the statute.

It must also be noted that the section we have quoted uses different language as applicable to cases of sales by the corporation, from that expressed in reference to purchases by like corporations.

They may not sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, but when it comes to the clause in reference to pro-

curing mining ground the language is, "nor to purchase or obtain in any way any additional mining ground" unless ratified by stockholders as therein provided.

This language would seem to imply that mining corporations may purchase or hold some mining ground without the necessity of the consent of stockholders as indicated, and that the statute aims only at the purchase or obtaining additional mining ground. To say that a thing is additional presupposes something to which it is an addition.

Additional land is land added to other land. An addition to a house can only be constructed where there is a house to which it is added. A mining corporation must have mining ground before it can acquire additional mining ground.

If this be true, and if it be true that a mining corporation may in the first instance acquire by purchase or location mining ground without the assent of its stockholders, then it must follow that we cannot say that a purchase of mining ground by the company is invalid for want of the assent of stockholders as provided by the statute until the evidence shows that it already holds mining ground—until it appears that the purchase or location is of additional ground as specified in the statute. The corporate powers, business, and property of all private corporations must be exercised under our law by a board of directors. (Civ. Code, sec. 305.)

Among the powers conferred upon corporations is the right "to purchase, hold, and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in this part." (Civ. Code, sec. 354, subd. 4.)

Every corporation is presumed to have power to purchase and hold real estate, and if there is anything in its charter, or the business in which it is engaged, or the law under which it is organized, abridging this power, it must be shown affirmatively. (*People v. La Rue*, 67 Cal. 526; *Stockton Sav. Bank v. Staples*, 98 Cal. 189; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300.)

We are of opinion that the general presumption of the power of corporations to buy and sell real property must prevail, except in these cases where the facts appearing of record show affirmatively that the case is one within the restriction of the act of

1880. In the case of a sale of real property by a mining corporation the transaction is a valid one without the assent of the stockholders, until it appears that the sale and conveyance is of its mining ground, for the reason that the restriction of the statute applies not to a sale of its real property generally, but only to that of its mining ground. So in case of the purchase of real property by a mining corporation, in order to render the assent of stockholders necessary, it must appear: 1. That the real property purchased is mining ground; and 2. That it is additional mining ground.

These being exceptions to a general rule, that corporations may acquire, sell, and convey property, he who objects to the validity of a conveyance must show the case to come within the exception, or it will be deemed valid.

In the present case there was no showing that the mining corporation owned or held any mining ground prior to the purchase evidenced by the conveyance in question.

Indeed, an inference may fairly be drawn from the record that the plaintiff did not own any mining ground prior to this conveyance.

The articles of incorporation show that the stock of the corporation plaintiff is divided into sixty thousand shares; that Kate L. S. Cummings and George W. Cummings subscribed for thirty thousand shares, or just one-half thereof.

The allegation of the answer is that one-half of the capital stock was in part consideration for the conveyance by said Cummings, which conveyance was executed June 19, 1894, the very day upon which the corporation plaintiff was organized.

The act of April 23, 1880, was amended in a number of important particulars since the trial of this cause. (Stats. 1897, p. 96.)

We recommend that the judgment appealed from be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

[Crim. No. 228. In Bank.—September 10, 1897.]

THE PEOPLE, Respondent, v. CHARLES G. KUHLMAN, Appellant.

CONTEMPT—DISOBEDIENCE TO CORONER'S SUBPOENA—PUNISHMENT BY SUPERIOR COURT—JUDGMENT NOT APPEALABLE—DISMISSAL OF APPEAL.—The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive; and, as a general rule, there is no appeal from a judgment or order adjudging one guilty of contempt; and where a coroner has adjudged a person guilty of contempt in disobeying a subpoena to appear at an inquest as a witness, an order thereupon made by the presiding judge of the superior court, that such person be imprisoned until he should testify before said coroner as directed by the latter, is not appealable, whether such order be viewed as within the general category of contempts, or as punishment for a misdemeanor, and an appeal therefrom will be dismissed.

ID.—JURISDICTION OF SUPERIOR COURT—UNLAWFUL IMPRISONMENT—REMEDY NOT BY APPEAL.—The question whether the superior court had jurisdiction to make the order appealed from cannot affect the invalidity of an appeal therefrom; and if appellant is imprisoned unlawfully, he must pursue some remedy other than appeal.

APPEAL from an order of the Superior Court of the City and County of San Francisco, directing imprisonment for contempt. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

J. B. Clarke, for Appellant.

Lennon & Hawkins, for Respondent.

McFARLAND, J.—While the coroner of San Francisco was holding an inquest, the appellant was subpoenaed to appear at the inquest as a witness. He appeared, but refused to testify. Thereupon, the coroner, proceeding under sections 17 and 18 of "An act in relation to coroners in the city and county of San Francisco," approved March 16, 1872 (Stats. 1871-72, p. 403), made an order which recited the facts, adjudged the appellant guilty of contempt for not testifying, and ordered the sheriff to take the appellant before some police or superior judge to be punished for such contempt. The appellant was taken before one of the superior judges of the city and county of San Fran-

cisco, whereupon an order was made by the superior court of which the said judge was the presiding judge, that the appellant, for such contempt, be imprisoned until he should testify before said coroner as directed by the latter. From said order the appellant has appealed to this court; and the matter is now presented upon the motion of the respondent to dismiss the appeal, upon the ground that the order is not an appealable order. The motion must be granted.

Section 1222 of the Code of Civil Procedure provides that: "The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." And the general rule is definitely settled that there is no appeal from a judgment or order adjudging one guilty of contempt.. (*Tyler v. Connolly*, 65 Cal. 28; *In re Vance*, 88 Cal. 262; *Estate of Wittmeier*, post, p. 000.) If there are exceptions to this general rule, this case does not present one.

Appellant contends that the case at bar is not within section 1222 of the Code of Civil Procedure, because, as he claims, that section refers only to contempts of a court which are specially enumerated in the preceding sections; but the order appealed from in the case at bar is either within the general category of contempts, or else the act for which the appellant was punished by the order of the superior court was simply a misdemeanor; and in either case no appeal to this court is provided for, either by the constitution or statute. There is no appeal from the superior court to this court in a criminal case, unless the appellant had been prosecuted in the former court under an information or indictment. Appellant contends that the superior court had no jurisdiction to make the order appealed from, and that the whole proceeding was void; but if that be so still no appeal would lie, and if appellant is imprisoned unlawfully he will have to pursue some remedy other than appeal.

The motion to dismiss the appeal is granted, and the appeal is dismissed.

Henshaw, J., Harrison, J., and Temple, J., concurred.

BEATTY, C. J., concurring.—I concur. Where, as in this case, a contempt proceeding is strictly criminal in its nature, where, in other words, the object of the proceeding is merely to

punish the defendant for a misdemeanor, it is clear that no appeal lies to this court. But I understand the rule to be different where the proceeding is merely a step taken in a civil action or proceeding after judgment for the purpose of enforcing a right of a party thereto.

I add this qualification to my concurrence only because the distinction between the two classes of contempts is not so clearly stated in the opinion of the court as to compel attention.

[S. F. No. 697. Department Two.—September 10, 1897.]

CHARLES KRIESS, Administrator, etc., Appellant, v. JULES FARON, et al., Respondents.

SALE AND LEASE BY BREWER—NOTES FOR PURCHASE MONEY—WANT OF CONSIDERATION—VIOLATION OF INTERNAL REVENUE LAWS—JUDGMENT OF FORFEITURE.—In an action upon promissory notes given in consideration of the sale of personal property connected with a brewery, which was leased by the payee to the maker of the notes, an answer setting up that the vendor, prior to the sale and execution of the notes, had violated the internal revenue laws of the United States in the business of brewing and selling beer, and that on that account the personal property sold had become, and was, liable to seizure and sale, and was thereafter seized and subjected to a judgment of forfeiture for such violation, and that said notes were executed and delivered without consideration, sets up a valid defense to the action.

ID.—PROCEEDINGS IN REM—PARTIES—CONCLUSIVENESS OF JUDGMENT AGAINST ABSENT OWNER—DEFAULT—DATE OF DIVESTITURE OF TITLE.—Where proceedings for the forfeiture of property are *in rem*, all the world are deemed to be parties thereto, and are concluded by the judgment of forfeiture; and such judgment is conclusive evidence against the former owner of the property, for whose violation of the revenue laws the forfeiture was adjudged, although he was not served with process, and was absent from the state when the property was seized and the judgment was rendered, and though the judgment against the property was rendered by default and without proof; and such forfeiture must be deemed to have attached at the time of the commission of the offense, and to have divested the title of the owner as of that date, as against his subsequent vendees.

ID.—ACTION UPON NOTES—ISSUE AS TO WANT OF CONSIDERATION—FINDING AS TO FAILURE—CONCLUSION OF LAW.—Where the answer in the action upon the notes given in consideration of the property adjudged to have been forfeited, pleaded all the facts as to the forfeiture, and set up want of consideration for the notes, and the court found all the facts touching the sale, the execution of the notes, the forfeiture, seizure, and sale of the

property, and the proceedings in court after the seizure, its concluding finding, repeated in its conclusions of law, that the consideration for the notes wholly failed prior to their maturity, is but the finding of its conclusion of law from the facts specifically found, and as the judgment for the defendant is right upon the facts found, it will not be reversed on the ground that failure of consideration was not within the issues.

ID.—EVIDENCE—COLLECTION OF OUTSTANDING ACCOUNTS—IRRELEVANT PROOF.—

Where there is neither allegation nor evidence in an action upon promissory notes, that outstanding accounts in favor of the plaintiff were sold to the defendants, or formed any part of the consideration of the notes sued upon, there can be no recovery in the action for moneys collected upon said accounts, and evidence in reference to such outstanding accounts, and as to whether defendants had collected any of them, is inadmissible.

ID.—IMMATERIAL EVIDENCE—STATEMENT AS TO OWNERSHIP OF PROPERTY SOLD

AND LEASED.—A sale of property is in itself an assertion of ownership; and where the notes in suit were given in part payment for personal property purchased, which was connected with a brewery leased by plaintiff to defendants, a statement made by plaintiff, at the time of the sale and lease, that he was the owner of the property sold, and had a right to lease it, is immaterial, and an objection thereto is properly sustained.

ID.—PART PAYMENT—USE OF MATERIALS BEFORE SEIZURE.—

Where part of the property sold consisted of materials for making beer, which were used by defendants before the property was seized for forfeiture incurred by the vendor, and it appears that two hundred dollars were paid in cash on account of the purchase, and the notes in suit were for the residue of the purchase money, and it does not appear what the value of the materials was, and there is no action to recover its value, such use of the materials does not affect the correctness of the findings and judgment as to want of consideration of the notes by reason of forfeiture of the property sold.

APPEAL from an order of the Superior Court of San Mateo County denying a new trial. John Reynolds, Judge.

The facts are stated in the opinion.

George W. Fox, for Appellant.

Edward F. Fitzpatrick, for Respondents.

HAYNES, C.—This action is upon two promissory notes made by Jules Faron and Margaret Faron on April 30, 1894, to Michael Kriess, each for the sum of \$150, the first due June 30th, and the second August 1, 1894. The action was commenced November 28, 1894.

The defendant, Margaret Faron, died after issue and before the cause was tried, and her administrator was substituted. The plaintiff, Michael Kriess, died after judgment, and his administrator was substituted.

The defendants answered separately, each alleging, in substance, the following facts: That on or about March 15, 1894, said Michael Kriess sold to defendant Jules Faron and one John Boos certain personal property consisting of horses, wagons, harness, malt, hops, and all materials of every kind for making and selling beer, and used in the "Pioneer Brewery," of all which Kriess represented himself to be the owner, and leased to them the brewery, fixtures, and stable until July 1, 1894, at a rental of thirty-five dollars per month, and it was further agreed that if the business of the brewery should be carried on to the satisfaction of the parties, and Faron and Boos should request it, Kriess would then execute a lease for five years. That Faron and Boos were to pay for said personal property five hundred dollars, of which sum they paid in cash two hundred dollars, and defendants executed the notes in suit for the remainder; that plaintiff had no legal right to sell said personal property, for the reason that on April 1, 1893, and continuously thereafter until May 19, 1894, he had used said property and conducted the business of brewing and selling beer in violation of the internal revenue laws of the United States, and because thereof said personal property became liable to seizure and sale, and that on May 19, 1894, said property was seized by the collector of internal revenue, and thereafter such proceedings were had in the District Court of the United States that a judgment of forfeiture of said personal property was entered, and the same was sold thereunder by the marshal, and by said seizure they were wholly deprived of said property on and after May 19, 1894, and that said notes were executed and delivered without consideration.

Plaintiff demurred to the answer of each defendant, and his demurrer was overruled.

The cause was tried by the court, written findings were filed, judgment thereon entered for defendants, and plaintiff appeals therefrom and from an order denying his motion for a new trial.

In view of the conclusions reached upon the merits of the appeal, it is not necessary to consider the objections made by respondent to our consideration of the questions presented by the appeal from the order denying a new trial, nor is it necessary to enter into a special discussion of the question presented by the

demurrer, as the general discussion of the specifications of the insufficiency of the evidence and of exceptions to rulings will sufficiently cover that.

The principal question is presented by appellant's objection to the introduction of the judgment-roll in the case of *The United States v. One Cooler*, etc., in the United States District Court, in which the forfeiture of said personal property was adjudged and under which it was sold by the marshal, and the effect of said judgment-roll as evidence.

The lease and agreement provided, among other things, that until July 1, 1894, the business of making and selling beer should be conducted "under and in the name of M. Kriess."

The information filed in the District Court, in separate counts, charged: 1. That Kriess had on April 1, 1893, and continuously thereafter until May 19, 1894, made beer for the purpose of being sold without the payment of the tax due thereon; 2. That between said dates he removed from said brewery one hundred and one barrels of beer without affixing thereto the stamps denoting said tax; 3. That he manufactured three thousand one hundred and forty gallons of beer without giving the bond required by law, and in the fourth count charged, generally, that between said dates he defrauded the United States of the tax due on said three thousand one hundred and forty gallons of beer, and that he used said barrels, packages, wagons, mares, and set of harness in the removal and concealment of said beer. Said proceedings were in rem.

No answer or claim having been made, the default of all parties not in court was entered, and a decree of forfeiture was made under which the property was sold.

It is objected that said judgment-roll was not admissible in evidence because it was a proceeding in rem; that Kriess was not a party to it; that he was absent from the state and not within the jurisdiction of the court; that no service was made upon him; that the judgment was by default and without any proof, and that there was no finding of fraud by any person.

The objection was properly overruled. Chief Justice Marshall, in *Mankin v. Chandler*, 2 Brock. 127, said: "I have always understood that where process is served upon the thing itself, and where the mere possession of the thing itself, by the service

of the findings or judgment. Two hundred dollars were paid in cash upon the amount of the purchase, and it does not appear what the value of the material used was, nor was the action brought to recover therefor.

The identity of the property seized and sold by the marshal with that sold by plaintiff to defendants was admitted by the plaintiff in response to a question put by the court.

The findings clearly sustain the judgment, and it, and the order denying a new trial, should be affirmed.

Belcher, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 210. Department One.—September 13, 1897.]

ALEX. HAMILTON et al., Appellants, v. DELHI MINING COMPANY et al., Respondents, and GEORGE BALDWIN et al., Appellants; C. W. KITTS, Intervenor, Appellant.

MECHANICS' LIEN—CONSOLIDATED MINING CLAIMS—OPERATION AS ONE MINE—CLAIMS OF LIEN.—Mining claims severally located on the same ledge and consolidated in one mining company, and worked by it as one mine, may, for the purposes of the mechanics' lien law, be regarded and treated as a single claim, and declared on as such; and claims of lien may be filed upon the property as a whole, without specifying the particular claim or location upon which work was done, or the amount due for labor on each claim, although the lien claimant worked on more than one location.

ID.—FINDING AS TO OPERATION OF CLAIMS—CONCLUSION OF FACT AMONG CONCLUSIONS OF LAW.—A finding that the claims were operated as one mine is none the less a conclusion of fact, because placed among the conclusions of law; and whether it is regarded as an independent finding of fact, or a deduction from special facts found, is immaterial, where the special facts found are sufficient to support the conclusion of fact.

ID.—CONTRACTS WITH OWNERS OF SEVERAL LOCATIONS—CONSOLIDATION NOT AUTHORIZED BY OWNERS—KNOWLEDGE OF FACTS—ABSENCE OF NOTICE TO LIEN CLAIMANTS—ESTOPPEL.—Where the owners of the several locations made several contracts with one person to sell to him their respective claims, with the right in him or his assigns to work each claim during the existence of the contract therefor, and such person or

ganized a mining company, to which all of the several contracts were assigned, and the consolidated claims were worked by it as one mine, to the knowledge of the owners of the several locations, and with the purpose and effect of enhancing the value both of the property as an entirety, and of each of the several locations embraced therein, the absence of express authorization for such consolidation in the several contracts is immaterial, and such owners are to be deemed to have authorized the improvement for that purpose, within the provisions of section 1192 of the Code of Civil Procedure, in the absence of the posting of the notice required by that section, that they would not be responsible for such work; and they are estopped, as against lien claimants, from objecting to want of authority for the consolidation.

ID.—MORTGAGE BY OWNERS AND JUDGMENT LIEN SUBORDINATE TO LABORERS' LIENS.—A mortgage executed by the owners of the several mining locations prior to the commencement of work upon the improvement of the consolidated claims as one mine by the mining company, but not recorded until after the cessation of such work, is subordinate to the liens of laborers employed thereupon by the mining company, having no notice or knowledge thereof, as is also a judgment lien docketed against such owners subsequently to such work.

ID.—LEASE OF MACHINERY AND IMPLEMENTS—OPTION TO PURCHASE—TITLE IN LESSOR—NONUSE IN MINE—LIENS NOT OPERATIVE.—Where the mining company held a lease of certain mining machinery and implements belonging to another company, at a fixed rental, with option to purchase, with a provision that title should remain in the lessor until the purchase money was paid, such portion of the machinery and implements as were not used in the working or developing of the mine, nor in any manner affixed thereto, are not part of the realty, nor subject to the liens of laborers upon the mine.

APPEALS from a judgment of the Superior Court of Nevada County. John Caldwell, Judge.

The facts are stated in the opinion of the court.

Charles W. Kitts, for Appellants Baldwin and Kitts.

Thomas S. Ford, and I. C. Lindley, for Appellants Alex. Hamilton et al.

Fred Searls, for Respondent Delhi Mining Company.

VAN FLEET, J.—Action to enforce laborers' liens against the mine and mining property of the defendant, Peach Blow Consolidated Gold Mining Company.

There are cross-appeals, both upon the judgment-roll, without a bill of exceptions, the plaintiffs appealing from a part only of

of the findings or judgment. Two hundred dollars were paid in cash upon the amount of the purchase, and it does not appear what the value of the material used was, nor was the action brought to recover therefor.

The identity of the property seized and sold by the marshal with that sold by plaintiff to defendants was admitted by the plaintiff in response to a question put by the court.

The findings clearly sustain the judgment, and it, and the order denying a new trial, should be affirmed.

Belcher, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 210. Department One.—September 13, 1897.]

ALEX. HAMILTON et al., Appellants, v. DELHI MINING COMPANY et al., Respondents, and GEORGE BALDWIN et al., Appellants; C. W. KITTS, Intervenor, Appellant.

MECHANICS' LIEN—CONSOLIDATED MINING CLAIMS—OPERATION AS ONE MINE—CLAIMS OF LIEN.—Mining claims severally located on the same ledge and consolidated in one mining company, and worked by it as one mine, may, for the purposes of the mechanics' lien law, be regarded and treated as a single claim, and declared on as such; and claims of lien may be filed upon the property as a whole, without specifying the particular claim or location upon which work was done, or the amount due for labor on each claim, although the lien claimant worked on more than one location.

ID.—FINDING AS TO OPERATION OF CLAIMS—CONCLUSION OF FACT AMONG CONCLUSIONS OF LAW.—A finding that the claims were operated as one mine is none the less a conclusion of fact, because placed among the conclusions of law; and whether it is regarded as an independent finding of fact, or a deduction from special facts found, is immaterial, where the special facts found are sufficient to support the conclusion of fact.

ID.—CONTRACTS WITH OWNERS OF SEVERAL LOCATIONS—CONSOLIDATION NOT AUTHORIZED BY OWNERS—KNOWLEDGE OF FACTS—ABSENCE OF NOTICE TO LIEN CLAIMANTS—ESTOPPEL.—Where the owners of the several locations made several contracts with one person to sell to him their respective claims, with the right in him or his assigns to work each claim during the existence of the contract therefor, and such person or

ganized a mining company, to which all of the several contracts were assigned, and the consolidated claims were worked by it as one mine, to the knowledge of the owners of the several locations, and with the purpose and effect of enhancing the value both of the property as an entirety, and of each of the several locations embraced therein, the absence of express authorization for such consolidation in the several contracts is immaterial, and such owners are to be deemed to have authorized the improvement for that purpose, within the provisions of section 1192 of the Code of Civil Procedure, in the absence of the posting of the notice required by that section, that they would not be responsible for such work; and they are estopped, as against lien claimants, from objecting to want of authority for the consolidation.

ID.—MORTGAGE BY OWNERS AND JUDGMENT LIEN SUBORDINATE TO LABORERS' LIENS.—A mortgage executed by the owners of the several mining locations prior to the commencement of work upon the improvement of the consolidated claims as one mine by the mining company, but not recorded until after the cessation of such work, is subordinate to the liens of laborers employed thereupon by the mining company, having no notice or knowledge thereof, as is also a judgment lien docketed against such owners subsequently to such work.

ID.—LEASE OF MACHINERY AND IMPLEMENTS—OPTION TO PURCHASE—TITLE IN LESSOR—NONUSE IN MINE—LIENS NOT OPERATIVE.—Where the mining company held a lease of certain mining machinery and implements belonging to another company, at a fixed rental, with option to purchase, with a provision that title should remain in the lessor until the purchase money was paid, such portion of the machinery and implements as were not used in the working or developing of the mine, nor in any manner affixed thereto, are not part of the realty, nor subject to the liens of laborers upon the mine.

APPEALS from a judgment of the Superior Court of Nevada County. John Caldwell, Judge.

The facts are stated in the opinion of the court.

Charles W. Kitts, for Appellants Baldwin and Kitts.

Thomas S. Ford, and I. C. Lindley, for Appellants Alex. Hamilton et al.

Fred Searls, for Respondent Delhi Mining Company.

VAN FLEET, J.—Action to enforce laborers' liens against the mine and mining property of the defendant, Peach Blow Consolidated Gold Mining Company.

There are cross-appeals, both upon the judgment-roll, without a bill of exceptions, the plaintiffs appealing from a part only of

the judgment, and the defendants Baldwin and the intervenor jointly appealing from the whole thereof.

1. The last-mentioned appeal will be first considered. The material facts involved in this appeal are these: In December, 1894, George W. Baldwin, Sr., owning the East Orleans and Baldwin, or Gracie, locations, and George W. Baldwin, Jr., owning the Morning Star and Birthday locations, each made a separate contract with one George Senn, by which they agreed to sell to Senn their respective claims, with the right in the latter, or his assigns, to work them during the life of the contracts; before doing any work, Senn organized the defendant, Peach Blow Consolidated Gold Mining Company, and assigned said contracts and his rights thereunder to that corporation. The corporation in April, 1895, started in to develop the claims, working them as one mine or claim; its work consisted in enlarging, timbering, and sinking deeper a shaft already on one of the locations, and commencing the erection of suitable works for the development and working of the mine, such as a mill, hoisting works, and other necessary buildings, a reservoir and pipe line, etc., which work embraced, to a greater or less extent, all four of the claims—they being adjoining and upon the same ledge. The plaintiffs were employed by the Peach Blow Company as mechanics and laborers to do the work indicated. The labor of some of them was confined to one of the several claims only, while others worked on two or more, and some on all. All the work was done between April 22 and June 12, 1895, at which latter date plaintiffs quit, and work ceased. The claims of lien were filed within thirty days from the cessation of work; they each described the work generally as having been performed "on the plant and consolidated mines of said defendant" (Peach Blow Mining Company), without designating the amount of work done or wages due upon any particular claim; and each described the premises upon which the lien was claimed as "that certain piece of mining property known as the mine, plant, and works of the Peach Blow Consolidated Gold Mining Company, a corporation," situated, etc., and consisting "of four locations, viz., the 'Birthday,' the 'Morning Star,' the 'East Orleans,' and the 'Baldwin' (or 'Gracie'), each being about fifteen hundred feet in length by six hundred

feet in width, and all forming one consolidated piece of mining ground, worked as one mine, by one corporation."

The Baldwins also worked on the mine for the Peach Blow Company during the same period, and knew of the labor that was being done thereon and the improvements made.

In January, 1895, the Baldwins gave to the intervenor, Kitts, a mortgage for five hundred dollars, covering all four of the several locations mentioned, which mortgage was recorded on September 17, 1895; and in October, 1895, Kitts recovered a judgment against the Baldwins in a justice's court for two hundred and ninety-nine dollars and costs, an abstract of which was filed in the recorder's office of Nevada county on October 24, 1895.

The court decreed the liens of the plaintiffs to be valid and binding, and a first charge against the entire property, both as to the interest of the Peach Blow Company and that of the Baldwins, and held the liens of the mortgage and judgment of Kitts to be subordinate thereto. This is complained of as error, as being in violation of the rights of these appellants.

It is contended that the declarations of lien filed by the plaintiffs were absolutely void, because they declared on the property as a whole, and did not specify the particular claim or location upon which the work was in any instance done, nor the amount due for labor on each claim, where the lien claimant worked on more than one.

As to the interest of the Peach Blow Company, this objection is clearly not good. Where several claims or locations are owned and operated as one mine, as against the parties so uniting them, they may, for the purposes of the lien law, be regarded and treated as a single claim, and declared on as such. (*Tredinnick v. Mining Co.*, 72 Cal. 78; *Malone v. Big Flat etc. Min. Co.*, 76 Cal. 578.)

It is urged that there is no finding that the claims were so worked, but merely a conclusion of law, unsupported by the facts. But this contention is not tenable. While the specific finding that the property was so operated is placed among the conclusions of law, it is none the less a conclusion of fact, and the circumstance that it was misplaced does not affect its character as such. Whether it be regarded as an independent finding of the fact, or

as a deduction from special facts found, is immaterial, since the latter are amply sufficient to support it.

Nor do we regard the objection made to the sufficiency of the declarations of lien as available to the Baldwins. While the ownership of the latter in the locations comprising the mine was several, and there was no express authorization in their contracts with Senn to work the separate claims as a consolidated property, they were nevertheless cognizant of the fact that the property was being developed as a single mine or claim, and that the improvement and labor thereon, wherever placed, was with the purpose and effect of enhancing the value, not alone of the property as an entirety, but of each of the several locations embraced therein. Under these circumstances, they are, within the provisions of section 1192 of the Code of Civil Procedure, deemed to have authorized the improvement for that purpose; and not having posted the notice required by that section, that they would not be responsible for such work, they are, as against these plaintiffs, estopped from raising the objection now made.

The other objections made to the sufficiency of the declarations of certain of the plaintiffs are without merit.

As to Kitts' mortgage and judgment, his liens thereunder did not attach until subsequent to those of the plaintiffs, and were, therefore, properly held to be subordinate thereto.

2. The appeal of the plaintiffs involves the single question whether the court below under its findings properly held that their liens did not cover certain mining machinery and implements, which they claim should have been included therein as a part of the mine.

The machinery and implements in question were upon the premises of the Peach Blow Company at the time the labor of plaintiffs was performed, but under these circumstances: all of said machinery belonged to the defendant, Delhi Mining Company, but had been by that company leased to George Senn, with an option to purchase, and it was stipulated in the lease that the machinery, mill, and appliances should remain the property of the Delhi company, until the purchase price was paid. The lease contained a clause providing that if the rent was not paid on the twenty-fifth day of May, 1895, or within five days there-

after, the Delhi Mining Company might retake possession of said property. Senn assigned his lease to the Peach Blow Company, and under the lease the property was removed from the Delhi Mining Company's premises to the Peach Blow mine, where it was piled, preparatory to use thereon. Neither the mill, machinery, hoisting works, tools, nor appliances covered by the lease, nor any part thereof, ever was erected upon or affixed to, or used in or upon, the mining ground of the Peach Blow Company, except one Pelton waterwheel, with the nozzle, and one hoisting reel and pipe, which were affixed to the building on the latter claim. The other machinery and tools remained on the ground of the Peach Blow Company, unattached and unused, until June 12, 1895, when, default having been made in the payment of the rent specified in the lease, the Delhi company took possession of said machinery and implements, and removed them from the premises.

From these facts the court determined that plaintiffs were not entitled to a lien on any part of the machinery and tools included in the lease, excepting only the Pelton waterwheel, hoisting reel, nozzle, and pipe, which had been affixed to the building.

Plaintiffs contend that under the facts all the machinery and tools were, within the rule of section 661 of the Civil Code, a part of the realty, and so subject to be taken in satisfaction of their liens. We do not perceive wherein that section of the statute has anything to do with the status of this property under the facts found. The section provides: "Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine." It is expressly found that the excepted machinery and tools were not erected upon, nor "used in the working or the developing" of the mine, and they cannot, therefore, by virtue of that section, "be deemed affixed to the mine." Nor do we know of any principle of law independently of the statute under which they could be held to have become a part of the mine, under the circumstances shown. They were in their nature "materials" furnished for use on the mine (*Roebbing's S. Co. v. Humboldt Electric etc. Co.*, 112 Cal. 288, and cases there cited), for the value of which no lien attaches in favor of the materialman, unless actually used in the mine or structure (*Silvester v.*

Cos Quartz Min. Co., 80 Cal. 510, 513); and certainly the laborer working on such mine or structure can be in no more favorable situation toward such unused material than the party furnishing the same.

The general theory upon which liens to laborers, mechanics, and materialmen are given is, that by the labor, or use of the material, the property has been enhanced in value. But none of this property was so used, nor was any of the labor done "upon" or "with" such machinery or tools; it remained, until carried away by its owner, the Delhi company, piled upon the ground where it had been dumped, wholly unused for any purpose connected with such labor, or the mine upon which the labor was performed. It was, therefore, neither within the letter or spirit of the section of the Civil Code above quoted, nor of section 1183 of the Code of Civil Procedure, which gives to one performing labor upon a mining claim a lien upon the same, and "the works owned and used by the owners" in its operation. The action of the court, therefore, in excluding it from the operation of plaintiffs' liens was proper.

The judgment is affirmed.

Harrison, J., and Beatty, C. J., concurred.

[Crim. No. 194. Department One.—September 13, 1897.]

THE PEOPLE, Respondent, v. W. G. PEARNE, Jr., Appellant.

CRIMINAL LAW—INVOLUNTARY MANSLAUGHTER—INDICTMENT—VARIANCE.—The crime of involuntary manslaughter is included in an indictment for murder, and where the indictment charged that the defendant did "deliberately, willfully, and unlawfully, kill one Ellen Dogan," the crime of manslaughter of both kinds is included in the charge of unlawful killing, and a conviction for involuntary manslaughter does not constitute a variance.

LD.—NEGLIGENT ACT CAUSING DEATH—RECKLESS DRIVING—COUNTY ORDINANCE IMMATERIAL.—Where it is claimed that the defendant, while intoxicated, drove his team of horses through the principal street of a town in a reckless manner, and at a great and unusual rate of speed, thereby causing the death of a feeble old woman, who was crossing the street, the charge of involuntary manslaughter should rest upon the commission of an act which might produce death, done without

due caution and circumspection; and evidence of the violation of a county ordinance does not strengthen the case, and is better omitted.

ID.—“UNLAWFUL ACT”—MALUM PROHIBITUM—INDEFINITE ORDINANCE—QUESTIONS SUGGESTED, BUT UNDECIDED.—It is suggested, but not decided, that an act which is merely *malum prohibitum*, in the violation of a municipal or county ordinance, is not an “unlawful act,” within the provision of section 192 of the Penal Code defining manslaughter; and also that a county ordinance making it a misdemeanor to drive at a greater rate of speed than six miles an hour within any unincorporated town or village containing five hundred inhabitants, without specifying or giving any boundaries of unincorporated villages and towns, or means whereby their populations may be determined, may be void by reason of uncertainty and indefiniteness.

ID.—CONTRADICTORY INSTRUCTIONS—NEW TRIAL.—Where the instructions are unsatisfactory and contradictory, and do not clearly and fairly present to the jury the law bearing upon the facts of the case, and seem both to exclude and to include consideration by the jury of the violation of a county ordinance, a new trial must be granted.

ID.—EVIDENCE—SOBRIETY OF DEFENDANT.—The exclusion of evidence of the sobriety of the defendant at the time of the accident is not erroneous, the question of sobriety being immaterial, if the deceased was run over and killed by the defendant “without due caution and circumspection.”

APPEAL from a judgment of the Superior Court of Butte County and from an order denying a new trial. John C. Gray, Judge.

The facts are stated in the opinion of the court.

George E. Gardner, R. C. Long, A. F. Jones, W. S. Goodfellow, and Garret W. McEnerney, for Appellant.

The indictment charges voluntary and not involuntary manslaughter, and the conviction of involuntary manslaughter is not supported, none of the acts constituting it being specifically charged. (*People v. Lee*, 107 Cal. 480–81; *People v. Ward*, 110 Cal. 369; *Bruner v. State*, 58 Ind. 159.) The violation of a municipal ordinance is not an “unlawful act” within the meaning of section 192 of the Penal Code. (*Commonwealth v. Adams*, 114 Mass. 323; 19 Am. Rep. 362; *Estell v. State*, 51 N. J. L. 182; 1 Bishop’s Criminal Law, 2d ed., sec. 258.) There was no proof that Biggs, at the time of the homicide, had five hundred inhabitants; and the ordinance is uncertain, indefinite, and void, in that no limits are fixed of an unincorporated town or village. The court erred in admitting testimony that defendant was

drinking and treating fifteen or twenty minutes after the accident, and in refusing testimony that he was not drunk. (*People v. Mitchell*, 62 Cal. 411.) The instructions were contradictory and calculated to confuse the jury. (*People v. Valencia*, 43 Cal. 555, 556; *People v. Anderson*, 44 Cal. 69; *People v. Messersmith*, 57 Cal. 575; *People v. Wreden*, 59 Cal. 392; *People v. Wong Ah Ngow*, 54 Cal. 151; 35 Am. Rep. 69; *People v. Campbell*, 30 Cal. 312.)

W. F. Fitzgerald, Attorney General, and W. H. Anderson, Assistant Attorney General, for Respondent.

The killing was involuntary manslaughter, being the unlawful killing of a human being without malice in the commission of an unlawful act not amounting to a felony. (Pen. Code, sec. 192.) The unlawful act of appellant in violating the provisions of the county ordinance was *malum in se*. Therefore, he was answerable for all the consequences that flowed from it. (*State v. Johnson*, 102 Ind. 247, 250; *Mercer v. Corbin*, 117 Ind. 450, 455; 10 Am. St. Rep. 76; *Surber v. State*, 99 Ind. 71; *State v. Glass*, 5 Or. 73; *Siemers v. Eisen*, 54 Cal. 418; *Driscoll v. Market Street C. Ry. Co.*, 97 Cal. 553; 33 Am. St. Rep. 203.) If there was any conflict in the instructions, the error was favorable to appellant.

GAROUTTE, J.—The defendant has been convicted of the crime of “involuntary manslaughter,” and appeals from the judgment. It is claimed that, while intoxicated, he drove his team of horses through the principal street of the town of Biggs, in a reckless manner, and at a great and unusual rate of speed. A feeble old woman selected this inopportune time to attempt a voyage across the street, with the result that she was run over by the driver and fatally injured. His indictment and conviction followed.

Section 192 of the Penal Code is as follows: “Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: 1. Voluntary—upon a sudden quarrel or heat of passion; 2. Involuntary—in the commission of an unlawful act not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.”

The indictment charged that the defendant "did deliberately, willfully, and unlawfully kill one Ellen Dogan." The evidence indicated that the killing was not done deliberately and willfully, but accidentally and unintentionally, and the jury taking that view of the matter, in the light of the instructions of the court as to the law, found the defendant guilty of "involuntary manslaughter."

It is now insisted that the indictment charges the crime of voluntary manslaughter, and that under such an indictment a verdict of involuntary manslaughter constitutes a fatal variance. It is claimed that in voluntary manslaughter there must be an intentional killing, while in involuntary manslaughter there must be an accidental or unintentional killing; and that the pleader in this case by charging an intentional killing will not be allowed to prove an accidental killing, for evidence to prove such a fact would be outside of the indictment. This position is not well taken. If this indictment had simply charged an "unlawful killing," without malice, it would have charged the crime of manslaughter of both kinds, voluntary and involuntary. By the additional words "deliberately and willfully," it certainly should not be held that it charges less than it did before those words were added. An "unlawful killing" is still charged, and such a killing constitutes involuntary manslaughter. It might with the same reason be urged that under an indictment charging a killing with malice and premeditation a conviction for killing without malice and premeditation would not be sustained. Yet it has always been held that upon an indictment charging murder a conviction for manslaughter was proper. In other words, when an indictment charges murder it also charges manslaughter. An indictment laid for murder charges an intentional killing; yet, under the criminal practice and procedure in this state, there is no doubt but that a verdict of involuntary manslaughter would find support in such a pleading. This is so because involuntary manslaughter is the "unlawful killing of a human being," and such crime is always included in an indictment for murder. Counsel for appellant have cited *Bruner v. State*, 58 Ind. 159, as opposed to these views. If the rules of criminal law pleading which obtain in that state are as liberal as those of this state,

we do not indorse the conclusion arrived at by the court in that case.

The prosecution introduced in evidence at the trial an ordinance of the County of Butte which declared it a misdemeanor to drive at a greater rate of speed than six miles an hour in any unincorporated town or village of that county which contained five hundred inhabitants. This evidence was offered for the purpose of showing that the defendant was guilty of a misdemeanor in driving at a greater rate of speed than six miles an hour in the town of Biggs, and for this reason it was claimed by the prosecution that he was engaged in the commission of an "unlawful act" when the killing was done. Counsel for appellant insist that an act which is merely *malum prohibitum* is not an "unlawful act," within the provisions of the section of the Penal Code defining manslaughter, and cite *Commonwealth v. Adams*, 114 Mass. 323, 19 Am. Rep. 362, which sustains that position. Counsel for defendant also claim that the ordinance is void by reason of uncertainty and indefiniteness in this, that no boundaries of unincorporated villages and towns in the county of Butte are given, and therefore it is impossible to ascertain when a town or village has a population of five hundred or more. There is reason in both of these contentions, and, if a disposition of this appeal demanded it, they would require mature consideration; but, in view of other matters presented by the record, we pass them by. In so doing we suggest that upon a retrial of this case, if the officers of the law deem a retrial advisable, the whole question of ordinance be omitted from the evidence. We do not see how the case is strengthened by it. In view of what has been said, the charge should rest upon the commission of an act done without due caution and circumspection.

The instructions of the court given to the jury are unsatisfactory and contradictory. They do not clearly and fairly present to the jury the law bearing upon the somewhat peculiar facts of this case. Notwithstanding there was considerable evidence offered pertaining to the matter of ordinance, we find no direct instructions bearing upon that question. In arriving at the verdict, we cannot tell whether the alleged violation of this ordinance of the county of Butte was considered by the jury in their deliberations. We cannot say that the jury were either told to

consider it or to lay it aside as a matter of no importance. The jurors were told by an instruction that: "If you should find from the evidence that the defendant, at the time of running over the deceased, was driving at a greater rate of speed than six miles an hour, that fact alone does not prove the guilt of the defendant." By this instruction it would fairly appear that the question of the ordinance was taken out of the case. If not, then the instruction is wrong under the theory of the prosecution as a declaration of a principle of law, for the prosecution claim that the mere act of driving at a greater rate of speed than six miles an hour, coupled with the act of killing, is sufficient to prove defendant's guilt. Again, the jury were told: "If the defendant was engaged in the commission of an unlawful act not amounting to a felony, and while so engaged ran over and killed Ellen Dogan, whether he intended to do so or not, it was manslaughter." There was no unlawful act in the case unless it was the violation of the aforesaid ordinance, and this instruction therefore appears to recognize the presence of the ordinance in question as an element in the case, and implies a demand that it be considered by the jury in arriving at a verdict. In effect, the jury were here told that if the defendant violated the ordinance, that is, drove at a greater rate of speed than six miles an hour, he thereby committed an unlawful act, and was guilty of the crime of manslaughter. Again, the jury were told that the defendant could not be convicted unless at the time of the accident he was driving in a "dangerous manner." This instruction is certainly inconsistent with the one we have just considered, where it is at least inferentially stated to the jury that the defendant would be guilty if he was driving at a rate of speed exceeding six miles per hour.

We find considerable evidence in the record under objection pertaining to the defendant's condition as to sobriety at the time of the accident. We see no good reason for the admission of such evidence before the jury. Certainly, if the deceased was run over and killed by the defendant "without due caution and circumspection" when not under the influence of liquor, his crime at least would be equally as apparent and heinous as if it had been committed by him when drunk.

For the foregoing reasons the judgment and order are reversed and the cause remanded for a new trial.

Van Fleet, J., and Harrison, J., concurred.

[S. F. Nos. 389 and 527. In Bank.—September 13, 1897.]

CITY OF OAKLAND, Respondent, v. OAKLAND WATER FRONT COMPANY, Appellant.

WATERFRONT OF OAKLAND—CONSTRUCTION OF STATE GRANT—"SHIP CHANNEL"—"SOUTHERLY LINE OF ESTUARY"—LINE OF LOW TIDE—BOUNDARY OF TOWN.—The grant by the state to the town of Oakland of all lands upon its waterfront, lying within the corporate limits, as fixed by the act of May 4, 1852, "between high tide and ship channel," is to be construed most favorably to the state, and the boundary of the town by "the southerly line of the San Antonio creek, or estuary," is to be construed as being the southerly line of low tide of that estuary, and the boundary by "ship channel" is to be construed as intending the line of low tide; and the boundary of the town of Oakland as defined by that act, commencing at the intersection of the northeast line with the line of low tide on the northern branch of the estuary, follows the line of low tide on said branch to the mouth of the eastern basin, crosses said mouth, and continues along the line of low tide on the southern side of the estuary to its mouth in the bay, and thence follows the line of low tide northerly and easterly till it intersects the northeastern boundary; and the grant to Oakland was of the lands lying between high-water mark and ship channel, within these boundaries, and included nothing west of the line of low tide on the bay front, and nothing beyond the line of low tide on the north and west shore of the estuary, the estuary being itself navigable, and a part of "ship channel."

ID.—LINE CROSSING EASTERN BASIN OF ESTUARY—EXTENSION OF SOUTHERLY LINE FROM HEADLAND TO HEADLAND.—The rule in surveying boundaries defined by streams or other waters is to follow the stream or body of water, crossing the mouth of affluents or other inlets from headland to headland; and in determining the boundary of the town of Oakland, which extends from the intersection of the northeast boundary with the southerly line of San Antonio creek or estuary, "down the southerly line of said creek to its mouth in the bay," the legislative conception of the creek or estuary is that it has a head above its intersection with the northeastern boundary line, and a mouth in the bay, and the southerly line of the creek at low tide must cross the mouth of the eastern basin of the estuary from headland to headland, and cannot stop from going down the southerly line of the creek or estuary, to ascend and make the circuit of the eastern basin.

ID.—STRICT CONSTRUCTION OF MUNICIPAL BOUNDARIES—CONNECTION WITH STATE GRANT—GENERAL WELFARE.—Where the boundaries of a gratuitous donation of lands from the state depend upon the boundaries of a municipal corporation fixed by the same act which makes the grant, the entire act, including the boundaries of the municipal corporation, is brought within the rule of strict construction against the grantee; but, considered without reference to the donation of lands, the

grant of the municipal franchise is to be construed in a manner most conducive to the general welfare, and a strict construction of the act defining municipal boundaries will be enforced, where the general welfare and the rights of other communities require it.

ID.—REINCORPORATION OF TOWN AS CITY—CHANGE OF BOUNDARY NOT RETROACTIVE UPON PROPERTY RIGHTS—HIGH TIDE UPON ESTUARY—LEGISLATIVE CONSTRUCTION DISREGARDED.—The act of 1854 (Stats. 1854, p. 184) by which the town of Oakland was reincorporated as the city of Oakland, and the rights and duties of the town were devolved upon the city, and by which it was enacted that the boundaries of the city should be the same as those of the town, but which specifically described "the eastern and southern high tide line" of the slough and estuary of San Antonio, as one of the boundaries, with a proviso saving the rights of the citizens of Clinton and San Antonio to construct wharves at their respective sites, whatever effect it may have had in extending the limits of the city from and after its passage, cannot be allowed any retroactive effect upon the property rights of the city or other grantee, which must be determined by the proper judicial construction of the act of 1852, regardless of any subsequent change in the city limits; and the construction which the act of 1854, and the subsequent act of April 24, 1862 defining the boundaries of the town of Oakland, sought to place upon the act of 1852, being erroneous, must be disregarded by the courts in determining the property rights depending upon that act.

ID.—POWER OF STATE TO ALIENATE TIDE LANDS—PUBLIC RIGHTS OF NAVIGATION AND FISHERY—CHICAGO CASE—GRANT TO TOWN OF OAKLAND.—The state has full power to alienate lands which are covered and uncovered by the daily flux and reflux of the tides, subject only to the rights of the public to use them for the purposes of navigation and fishery; and such lands are alienable in private ownership where capable of reclamation without detriment to the public right, and especially where their reclamation will be of advantage to navigation and commerce; and there is nothing in the doctrine established by the case of *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, relative to the nonalienability of lands continually submerged beneath the waters of Lake Michigan in the harbor of Chicago, which is inconsistent with the right of the state of California to grant to the town of Oakland the mud flats and shoals along its waterfront lying between high and low tide, with a view to facilitate the construction of wharves and other improvements, it not appearing that such grant has impaired the power of succeeding legislatures to regulate, protect, improve, or develop the public rights of navigation and fishery.

ID.—POWER OF OAKLAND TO ALIENATE ENTIRE WATERFRONT—QUESTION OF LEGISLATIVE INTENT—PUBLIC TRUST—INVALID TRANSFER TO PRIVATE CITIZEN.—The town of Oakland had no power to alienate its entire waterfront, unless such power was conferred upon it by the legislature; and whether it was conferred or not is a question of legislative intent, to be gathered from the terms of the statute construed with reference to its general scope and purpose; and the clear intent of the act creating the town of Oakland, and granting to it the tide

lands along its water front, was to confer upon it a public trust for the improvement of commercial facilities by the erection of convenient wharves along its waterfront, and the regulation and collection of wharfage and dockage for their use, which public trust it could neither delegate nor abdicate, nor was any power conferred upon it to alienate the tide lands, which were essential to the exercise of its power to erect wharves and regulate tolls; and an attempt by the town to invest a private citizen with the exclusive right to erect wharves and regulate tolls, and to transfer to him the entire waterfront, in consideration of his erecting wharves thereon, was unauthorized and void.

ID.—LIMITED POWER OF ALIENATION—PROVISION FOR STREETS AND WHARVES—SALE OF LANDS BY PARCELS—SALE IN BULK VOID.—The intention of the law was that the streets of the town should be protracted to the waterfront, the intervening spaces divided into blocks and lots, and sold in subdivisions, in such manner as to preserve to the public ample means of access to the navigable waters of the bay and estuary, and to the municipal authorities ample space for the erection of wharves, piers, and docks, and if any reasonable measures to this end had been taken, a sale of the lands by parcels would have been a proper exercise of power by the municipal authorities; but a transfer in bulk to a private citizen, without any reservation of the right of access to navigable waters by which the town was largely surrounded, was a gross and evident excess of power.

ID.—DISMISSAL OF SUIT IN EQUITY BY CITY—MANDATE OF SUPREME COURT—RES ADJUDICATA—QUESTION OF TITLE UNDETERMINED.—The dismissal of a suit in equity brought by the city of Oakland to set aside the grant of the waterfront assumed to have been made by the town as being fraudulent and void, which was dismissed in obedience to a mandate of the supreme court, whose decision left the question of title in the grantee undetermined, and adjudged that there was no ground in equity for the relief asked for, and that, if the grant was void, the city could disregard it, and assert its rights in any appropriate manner, is not *res adjudicata* upon the question of title, and does not estop the city to assert the void character of the grant in a subsequent action.

ID.—LEGISLATIVE RATIFICATION OF TOWN ORDINANCE—CONFIRMATION OF VOID GRANT—POWER OF LEGISLATURE—QUESTION OF INTENTION UNDETERMINED. It was within the power of the legislature to vest title to the tide lands on the Oakland waterfront in the grantee of the town under a void ordinance of the town, purporting to grant the same, by legislation clearly ratifying such ordinance; but the question whether the act of 1861, amending section 12 of the city charter so as to provide that "the ordinances of the board of trustees of said town are hereby ratified and confirmed," was intended to include a void special ordinance purporting to grant the entire waterfront to a private citizen, or whether it was only intended to include general ordinances of a legislative character, is one upon which the justices of the court are disagreed, and is undetermined.

ID.—WATERFRONT LANDS NOT SUBJECT TO EXECUTION.—The lands between high and low tide along the waterfront of Oakland, being held by

the town subject to the public trust of laying out streets through them, and using them as sites for wharves, docks, piers, and other essential aids to commerce, and to the traffic of a seaport town, were not subject to levy and sale under execution against the town.

ID.—VALID COMPROMISE UNDER LEGISLATIVE AUTHORITY—TITLE CONFIRMED IN WATERFRONT COMPANY—EXCEPTIONS—PUBLIC EASEMENTS.—The compromise effected in April, 1868, between the city of Oakland, the Oakland Water Front Company, and the Western Pacific Railroad Company, pursuant to authority given by the act approved March 21, 1868, the passage of which was especially obtained by the parties, and by the terms of which the city council and mayor of Oakland were authorized and empowered to compromise, settle, and adjust any and all claims, demands, and controversies, and causes of action, in which the city was interested, was valid and effective; and after the date of said compromise, the city of Oakland had no ownership, as trustee or otherwise, of any portion of her waterfront, except those portions secured to her by the compromise, and such streets, thoroughfares, and other parcels as were previously dedicated to public use; and the title of the Oakland Water Front Company and its assigns to the entire waterfront was confirmed subject to those exceptions, and to the public easements and right of control in the city over the lands so dedicated.

ID.—REASONABLENESS OF COMPROMISE—DISCRETION OF MAYOR AND COUNCIL—ABSENCE OF FRAUD.—The question as to the reasonableness or unreasonableness of the compromise, and as to what the city should exact or concede in making it, was a matter confided to the discretion of the mayor and council, and, in the absence of fraud, their judgment thereupon was conclusive.

ID.—STREETS AND PUBLIC PLACES—CITY NOT ESTOPPED BY CONSENT DECREES—STATUTE OF LIMITATIONS INAPPLICABLE.—With respect to streets and public places dedicated to public use, the city is not estopped by consent decrees, and the statute of limitations does not apply.

APPEALS from a judgment of the Superior Court of Alameda County and from an order denying a new trial. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

A. A. Moore, J. C. Martin, H. S. Brown, John Garber, and W. F. Herrin, for Oakland Water Front Company, Appellant in Appeal No. 527 and Respondent in Appeal No. 389.

The city of Oakland is estopped from bringing this action by its conduct and acquiescence. Municipalities and states may be thus estopped. (*State etc. v. Flint etc. Ry. Co.*, 89 Mich. 481, 487; *State etc. v. Jackson etc. R. R. Co.*, 69 Fed. Rep. 116; *Cohn v. Barnes*, 5 Fed. Rep. 326; *Hough v. Buchanan*, 27 Fed. Rep.

328; *Pengra v. Munz*, 29 Fed. Rep. 830; *Indiana v. Milk*, 11 Fed. Rep. 389; *United States v. Dalles etc. Road Co.*, 41 Fed. Rep. 493; *Commonwealth v. Andre*, 3 Pick. 224; *Williamsburg Sav. Bank v. Solon*, 138 N. Y. 465; *Moran v. Commissioners of Miami County*, 2 Black, 722; *County of Moultrie v. Savings Bank*, 92 U. S. 631; *Kneeland v. Gilman*, 24 Wis. 39; *Commonwealth v. Pejepscut etc.*, 10 Mass. 155; *County of Randolph v. Post*, 93 U. S. 502; *Zabriskie v. Cleveland etc. R. R. Co.*, 23 How. 381; *Brookhaven v. Smith*, 118 N. Y. 634.) The enforcement of municipal taxes against the Oakland Water Front Company estops the city to question its title. (*Fresno v. Fresno etc. Irrigation Co.*, 98 Cal. 179; *Adams County v. Burlington etc. R. R. Co.*, 39 Iowa, 507, 510; *Audubon County v. American Emigrant Co.*, 40 Iowa, 460; *Austin v. Bremer County*, 44 Iowa, 155; *Simplot v. Dubuque*, 49 Iowa, 630; *Smith v. Osage*, 80 Iowa, 84; *State v. Flint etc. Ry. Co.*, *supra*; *Diamond Coal Co. v. Fisher*, 19 Pa. St. 267; *Murphy v. Packer*, 152 U. S. 398; *State v. Milk*, 11 Biss. 197; *Breaux v. Negrotto*, 43 La. Ann. 426; *People v. Hagadorn*, 104 N. Y. 516.) Oakland is estopped by the judgment of absolute dismissal of the action of *Oakland v. Carpentier*, 13 Cal. 540, with no reservation of a right to bring a new action. (*Durant v. Essex Co.*, 7 Wall. 107; *Gove v. Lyford*, 44 N. H. 525; *Foote v. Gibbs*, 1 Gray, 412; *Thurston v. Thurston*, 99 Mass. 39; *Bradley v. Bradley*, 160 Mass. 258; *Perine v. Dunn*, 4 Johns. Ch. 140; *Forist v. Bellows*, 59 N. H. 229; *Knowlton v. Hanbury*, 117 Ill. 471-74; *Jenkins v. Johnston*, 4 Jones Eq. 151; *Curts v. Trustees*, 6 J. J. Marsh. 536; *Thompson v. Clay*, 3 T. B. Mon. 359; 16 Am. Dec. 108; *Messinger v. New England Mut. Life Ins. Co.*, 59 Fed. Rep. 416; *Alley v. Nott*, 111 U. S. 472; *Bissell v. Spring Valley Tp.*, 124 U. S. 225; *Williams v. Hollingsworth*, 5 Lea, 358; *Goebel v. Ifta*, 111 N. Y. 170, 177; *Gates v. Preston*, 41 N. Y. 113; *Cochran v. Couper*, 2 Del. Ch. 27; *Parrish v. Ferris*, 2 Black, 606; *Case v. Beauregard*, 101 U. S. 688; *Lyon v. Perin etc. Co.*, 125 U. S. 698.) The city is estopped by the judgment notwithstanding its claim to be a trustee for the public. (*San Francisco v. Holladay*, 76 Cal. 18; *San Francisco v. Itsell*, 80 Cal. 57; *People v. Holladay*, 93 Cal. 241; 27 Am. St. Rep. 186; 102 Cal. 661; *Los Angeles v. Cohn*, 101 Cal. 373-77.) In every case of dismissal not otherwise provided for by statute, the judgment of dismissal is upon

the merits. (Practice Act, sec. 149; *Merritt v. Campbell*, 47 Cal. 542; *Phillpotts v. Blasdell*, 10 Nev. 19; *United States v. Parker*, 120 U. S. 95.) The stipulated judgment in favor of the Oakland Water Front Company quieting its title against the city of Oakland is a bar to the present action, there being no impeachment of it for fraud, collusion, or mistake of fact. (*Holmes v. Rogers*, 13 Cal. 191; *Semple v. Wright*, 32 Cal. 659; *Merritt v. Campbell*, *supra*; *McCreery v. Fuller*, 63 Cal. 30; *Partridge v. Shepard*, 71 Cal. 470; *Crossman v. Davis*, 79 Cal. 603, 604; *Phillpotts v. Blasdell*, *supra*; *Thompson v. Maxwell etc. Ry. Co.*, 95 U. S. 397; *Nashville etc. Ry. Co. v. United States*, 113 U. S. 261; *United States v. Parker*, 120 U. S. 95; *White v. Crow*, 17 Fed. Rep. 98; *Derby v. Jacques*, 1 Cliff. 425; *Armstrong v. Cooper*, 11 Ill. 540-42; *Flagler v. Crow*, 40 Ill. 414; *Indiana etc. Ry. Co. v. Bird*, 116 Ind. 217; 9 Am. St. Rep. 842; *Gifford v. Thorn*, 9 N. J. Eq. 702.) A municipal corporation authorized by the legislature to compromise a disputed claim or a pending suit concludes itself by such compromise. (*People v. Coon*, 25 Cal. 635; *Hall v. Baker*, 74 Wis. 118; *Board of Liquidation v. Louisville etc. R. R. Co.*, 109 U. S. 221; *County of Dakota v. Glidden*, 113 U. S. 222; *Petersburg v. Mappin*, 14 Ill. 193; 56 Am. Dec. 501; *Agnew v. Brall*, 124 Ill. 312; *Grimes v. Hamilton Co.*, 37 Iowa, 290.) The state had authority to dispose of tide and submerged lands upon the waterfront of the bay and estuary. (*Eldridge v. Cowell*, 4 Cal. 80; *Chapin v. Bourne*, 8 Cal. 294; *Hyman v. Read*, 13 Cal. 444; *Holladay v. Frisbie*, 15 Cal. 630; *Wheeler v. Miller*, 16 Cal. 124; *Bondurant v. Watson*, 103 U. S. 281; *Burgess v. Seligman*, 107 U. S. 20, 33; *Gage v. Pumpelly*, 115 U. S. 454; *Hardin v. Jordan*, 140 U. S. 371; *Shively v. Bowlby*, 152 U. S. 1; *Baer v. Moran Bros. Co.*, 153 U. S. 287; *Mann v. Tacoma Land Co.*, 153 U. S. 273; *Brookhaven v. Strong*, 60 N. Y. 56; *Trustees v. Smith*, 118 N. Y. 634; *Mayor etc. v. Hart*, 95 N. Y. 443; *Langdon v. Mayor etc.*, 93 N. Y. 129; *Commonwealth v. Alger*, 7 Cush. 53; *Ramsey v. New York etc. R. R. Co.*, 114 N. Y. 427; *Hoboken v. Pennsylvania R. R. Co.*, 124 U. S. 657; *Gough v. Bell*, 22 N. J. L. 456, 457; *People v. New York etc. Co.*, 68 N. Y. 77, 78; *Nichols v. Boston*, 98 Mass. 42; 98 Am. Dec. 132; *Hinman v. Warren*, 6 Or. 410; *Parker v. Taylor*, 7 Or. 446, 447; *Bowlby v. Shively*, 22 Or. 416; *Lewis v. Portland*, 25 Or. 133; 42 Am. St.

Rep. 772; *Case v. Loftus*, 39 Fed. Rep. 730; *Scurry v. Jones*, 4 Wash. 468; *Eisenbach v. Hatfield*, 2 Wash. 236; *Boston v. Le Craw*, 17 How. 432, 433; *Fitchburg R. R. Co. v. Boston etc. R. R. Co.*, 3 Cush. 86, 87; *Winnisimmett Co. v. Wyman*, 11 Allen, 432; *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51; *Austin v. Rutland Ry. Co.*, 17 Fed. Rep. 460; 45 Vt. 215; *State v. Cozzens*, 2 R. I. 561; *Engs v. Peckham*, 11 R. I. 210; *Gerhard v. Seekonk etc. Commrs.*, 15 R. I. 334; *East Haven v. Hemmingway*, 7 Conn. 186; *Prior v. Swartz*, 62 Conn. 132, 136, 138; 36 Am. St. Rep. 333; *American Dock etc. Co. v. Public School Trustees*, 39 N. J. Eq. 409; *Potomac Steamboat Co. v. Upper Potomac etc. Co.*, 109 U. S. 672; *Hardy v. McCullough*, 23 Gratt. 251; *Norfolk City v. Cooke*, 27 Gratt. 435; *McCready v. Virginia*, 94 U. S. 391; *Hatfield v. Grimstead*, 7 Ired. 139; *Bond v. Wool*, 107 N. C. 148, 150; *Gregory v. Forbes*, 96 N. C. 77; *State v. Narrows Island Club*, 100 N. C. 477; 6 Am. St. Rep. 618; *Rivas v. Solary*, 18 Fla. 122; *Galveston v. Menard*, 23 Tex. 349; *Hogg v. Beerman*, 41 Ohio St. 81; 52 Am. Rep. 71.)

William R. Davis, W. Lair Hill, E. J. Pringle, and H. A. Powell, for City of Oakland, Respondent in Appeal No. 527, and Appellant in Appeal No. 389.

The town of Oakland could not pass the legal title to the lands on the waterfront by ordinance. (Dillon on Municipal Corporations, 4th ed., secs. 581, 582; *Oakland v. Carpentier*, 13 Cal. 540.) The confirmatory act of 1854, applies to legislative ordinances generally, and cannot be presumed to have been intended to give away the property of the city by confirming a void granting ordinance. (*San Diego Water Co. v. San Diego*, 59 Cal. 521, 522; Endlich on Interpretation of Statutes, secs. 113, 114; *United States v. Fisher*, 2 Cranch, 400.) The act of March 21, 1868, did not apply to the title of the city, there being no "controversy" to which it applied, and it did not embrace the subject matter of the waterfront. (*Haseltine v. Hewitt*, 61 Wis. 121.) The compromise was unreasonable in that it gave away substantially the entire waterfront. (*San Diego v. San Diego etc. R. R. Co.*, 44 Cal. 113, 114.) The legislature cannot give away property held by the city upon a public trust, nor sanction an unauthorized conveyance of it. (*San*

Francisco v. Itsell, 80 Cal. 57; *Weisenberg v. Truman*, 58 Cal. 63; *People v. Kerr*, 27 N. Y. 188; *Ligare v. Chicago*, 139 Ill. 46; 32 Am. St. Rep. 179; *Matthews v. Alexandria*, 68 Mo. 115; 30 Am. Rep. 776.) The consent judgment could not estop the city as to property held by it upon a public trust. (*San Francisco v. Le Roy*, 138 U. S. 656; *Jenkins v. Robertson*, L. R. 1 Sc. & Div. App. Cas. 117; *Kelly v. Milan*, 127 U. S. 139; *Branham v. San Jose*, 24 Cal. 604.) The dismissal of the bill in *Oakland v. Carpentier*, *supra*, did not conclude the rights of the city. (*Fulton v. Hanlow*, 20 Cal. 450; *Rosenthal v. McMann*, 93 Cal. 508, 509; *Flandreau v. Downey*, 23 Cal. 354; *Davenport v. Turpin*, 43 Cal. 597; *Russell v. Place*, 94 U. S. 606.) The waterfront being devoted to public use could not be sold under execution. (*Darlington v. Mayor etc.*, 31 N. Y. 164; 88 Am. Dec. 248; *Ranson v. Boal*, 29 Iowa, 68; *Hart v. Burnett*, 15 Cal. 530.) The statute of limitations is not applicable to this case. (*Weber v. Harbor Commrs.*, 18 Wall. 67.) The grant to Carpentier was necessarily revocable from the nature of the case, and was in fact revoked. (*Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387.)

BEATTY, C. J.—This is an action to determine conflicting claims to real estate. The subject of the controversy is the land granted to the town of Oakland, by the original act of incorporation, passed May 4, 1852. (Stats. 1852, p. 180.)

The claim of the plaintiff is, that as successor to the town of Oakland it continues to be the owner of the land so granted. The defendant, as successor to Horace W. Carpentier, claims that the entire grant to the town of Oakland was, within a few days after the organization of the town council, transferred to Carpentier by ordinance and deed of conveyance; that such transfer was subsequently confirmed and ratified by other ordinances and proceedings of the town and city, by acts of the legislature, by the estoppel of judgments and estoppels *in pais*, and that its title so acquired is fortified by deeds made in pursuance of execution sales on judgments against the town, and perfected by prescription under the statute of limitations. So far as I may find it necessary to discuss these various deraignments of title their particulars will be stated as they arise.

As the findings and decree of the superior court, as well as a principal part of the argument of counsel for respondent, are based upon a certain assumption as to the size and location of the grant, it becomes a point of capital importance to determine at the outset whether that assumption is well founded, for if it shall appear that it is based upon a radical misconstruction of the act of incorporation, and that the grant is really of much less extent than has been so assumed, it must necessarily follow that the conclusions of the superior court, and the argument based upon them, will be to some extent invalidated.

In determining this point we shall not be greatly assisted by the labors of counsel, for, since both parties are contending for the land granted, each is naturally interested in maintaining a construction of the grant which will give it the widest possible extent.

It is true that at the hearing of this appeal counsel for defendant, for the purpose of avoiding the force of the argument based upon the supposed inordinate extent of the grant to Carpentier, suggested, rather than contended, that perhaps the grant did not embrace so much of the submerged land on the bay front of the city as the superior court and counsel for the plaintiff have assumed. They did not, however, frankly and unequivocally take that position, and the concessions they seemed inclined to make do not include all that is required by any consistent construction of the act of incorporation.

As to the plaintiff, its interests, of course, demand that it should contend for the most liberal construction of the grant; for the greater its extent the stronger is the argument founded on the doctrine of the Chicago case (*Illinois Cent. R. R. v. Illinois*, 146 U. S. 387) against the validity of its alleged transfer to a natural person or private corporation, and the greater the prize to be obtained by the success of the argument. Naturally, therefore, we find counsel for plaintiff confidently asserting as a matter beyond controversy that the grant to the town of Oakland embraced the whole of the estuary of San Antonio, including what is now called the eastern or Brooklyn basin, up to the line of high-water mark on all sides of that inlet, and that it extended out into the bay of San Francisco to the three or four fathom line at low tide, containing in all eight thousand acres of land,

spreading out like a fan on the bay front, and covering at its outer edge more than the entire frontage of Oakland and Alameda.

I find myself constrained to dissent radically from this view, and since the settlement of this question at the outset is essential to a proper discussion of the case, I shall here state my own construction of the grant, with the reasons upon which it is founded.

The grant to the town of Oakland is contained in the third section of the original act of incorporation (Stats. 1852, p. 181), and the description is in these words: "The lands lying within the limits aforesaid [i. e., the corporate limits of the town as defined in the first section of the act] between high tide and ship channel."

Such being the terms of the grant, it is evident that its extent and location depend primarily upon the proper construction to be given to the first section of the act defining the corporate limits. The boundaries of the town are defined as follows: "On the northeast by a straight line at right angles with Main street, running from the bay of San Francisco on the north to the southerly line of the San Antonio creek, or estuary, crossing Main street at a point three hundred and sixty rods northeasterly from 'Oakland House,' on the corner of Main and First streets, as represented on Portios' map of 'Contra Costa,' on file in the office of the secretary of state; thence down the southerly line of said creek, or slough, to its mouth in the bay; thence to ship channel; thence northerly and easterly by the line of ship channel to a point where the same bisects the said northeasterly boundary line."

The first point of difficulty that presents itself in giving a construction to this language is to determine what is the southerly line of San Antonio creek, or estuary. There are two, and only two, definite lines of that creek on the southern side, viz., the line of high tide and the line of low tide. It is sufficiently clear that one or the other of these two lines was intended by the legislature, but the question remains, Which was intended?

It has been assumed throughout the argument, and I understand both parties to be agreed in this claim, that the intention of the legislature was to extend the corporate limits of Oakland to the line of high tide on the opposite side of the estuary, and to carry it around the eastern or Brooklyn basin.

There is not, in my opinion, any possible ground for such a construction of the original act of incorporation, though it is true that a subsequent legislature did its best to legislate such a construction into the original act. The first symptom of this attempt at legislative construction is to be found in the second section of the act of 1854 (Stats. 1854, p. 184), by which the town of Oakland was reincorporated as the city of Oakland, and the rights and duties of the town devolved upon the city. It is there enacted that the boundaries of the city shall be the same as those of the present town, but a proviso is added saving the right of the citizens of the towns of Clinton and San Antonio to construct wharves at their respective sites, which seems to imply that the eastern basin was regarded as a part of Oakland. This proviso may have been inserted by the legislature out of an abundant caution merely, or it may have been deliberately intended by the framer of the act to give a certain plausibility to the pretensions more fully disclosed in the amendment to this section of the act of 1854, contained in the act of May 15, 1861 (Stats. 1861, p. 386), in which the description of the corporate boundaries is expanded as follows:

"Sec. 2. The boundaries of said city shall be the same as the boundaries of the late town of Oakland, which are more particularly defined and described as follows, to wit: Northerly by a straight line drawn at right angles with Broadway, formerly Main street, in said city, crossing the extended line of Broadway at a point three hundred and sixty rods northerly from where formerly stood the 'Oakland House,' on the northwest corner of Broadway and First streets, and running from the bay of San Francisco on the west to the easterly or southeasterly line of that branch of the San Antonio slough or estuary, over which crosses the bridge from Oakland to Clinton; thence along the eastern and southern high tide line of said slough and of the estuary of San Antonio, following all the meanderings thereof to the mouth of said estuary, in the bay of San Francisco; thence southwesterly to ship channel; thence northerly along the line of ship channel to a point where the same intersects the said northerly boundary line extended westerly; provided, that nothing in this section contained shall be so construed as to prohibit or abridge the rights of the trustees of the towns of Clinton and San Antonio, whenever the citizens thereof may elect to become a body corpo-

rate under the provisions of an act for the incorporation of towns, or under the provisions of any act which may hereafter be passed, to provide for the construction of wharves and other improvements for the accommodation and convenience of the trade, travel, and commerce of the said towns or villages, at their respective sites."

Whatever effect this amendment may have had in extending the municipal limits of the city of Oakland from and after the date of its passage, it cannot be allowed any retroactive effect upon the property rights of the city or of her grantees, and if the construction which it attempts to place upon the act of 1852 is erroneous, as it clearly is, the courts, in determining the rights of the parties to this action, not only may, but must, disregard it. The same remarks are applicable to the act of April 24, 1862, (Stats. 1862, p. 337), by the second section of which the legislature again sought to give a more particular definition to the original boundaries of the town of Oakland, and in so doing extended it to the highest tide line of the estuary, thereby including a wide expanse of salt marsh above the level of ordinary high tide.

What, then, is the proper construction of the act of 1852? I think it clear that the southerly line of the San Antonio creek or estuary intended by the act was the line of low tide, and not the high tide line, and that this line was to be followed down the creek to the bay, crossing the mouth of the narrow channel connecting with the eastern basin, and not ascending that channel, and following around the basin. If we were dealing with a grant of lands pure and simple, made by the state out of its mere bounty and not upon any valuable consideration, this conclusion would follow inevitably from a principle of construction based upon the presumption that always attends upon such grants, viz., that the words of the grant are attributable to the party securing the legislation, or, in other words, to the grantee; and, consequently, that all ambiguities or uncertainties in its terms are to be resolved in a manner most favorable to the state and least favorable to the recipient of its bounty. But this is not a mere grant of lands, and it may be argued that a more liberal rule of construction is applicable to a law defining the boundaries of a municipal corporation. It would seem to be a sufficient answer to this sug-

gestion to say that if this is not a grant of lands pure and simple, neither is it purely and simply an act of incorporation. It contains also a gratuitous donation of lands—a grant sufficiently munificent upon any construction—and because the boundaries of the grant depend upon the boundaries of the corporation the entire act is brought within the reason of the rule of strict construction above stated.

There is, moreover, another and distinct ground for holding to a strict construction of that part of the act defining the municipal boundaries considered without reference to the grant of lands. The state acts for the public good, and all its grants, including the grant of municipal franchises, are to be construed in a manner most conducive to the general welfare. The town of Oakland as incorporated was situated upon one side of a navigable estuary—navigable in fact and so declared by law. Upon the opposite sides of the estuary were the towns of Clinton and San Antonio, communities as much entitled to the bounty and consideration of the state as the inhabitants of Oakland. These communities, and those to grow up in the future on the southern border of the estuary—then unoccupied—had a natural right to the common use of this body of navigable water, to unrestricted access to its shores, and to the privilege of constructing wharves, docks, piers, and other aids to commerce, fully equal to that of the people of Oakland. It was, therefore, a stretch of liberality on the part of the state to include the whole of the estuary, even to low-water mark on its southern and eastern side, in the limits of Oakland, and it would have been a gross and indefensible excess of liberality to extend its boundaries to include the margin between high and low water mark on that side, thus depriving other communities of privileges of vital importance to them, without any corresponding benefit to Oakland. In saying this I do not forget that a subsequent legislature did, in the manner above stated, actually extend the boundaries of the city of Oakland so as to include the whole estuary, eastern basin and all, to high-water mark on all sides, and did attempt to say that such was the effect of the original act of 1852. As to this attempt of the legislature to impose a construction upon the act of a former legislature, I have already stated my opinion that it was nugatory; and as to the extension of the boundaries

of Oakland effected by the amendment—if such was its effect—it may be remarked that its excessive liberality was materially qualified by the proviso reserving to the inhabitants of the towns of Clinton and San Antonio the right to construct wharves and other conveniences for trade and travel at their respective sites as means of access to the navigable waters of the estuary. True, there was no reservation of the same rights to the future inhabitants of Alameda on the south side of the estuary, but the fact that one legislature has improvidently extended the municipal boundaries in one direction is no reason for holding that an ambiguous grant of a former legislature should be construed in a sense which would render it similarly improvident with respect to the corporate limits, and infinitely more so in its disposition of public navigable waters.

As to the principle which I have assumed governs in the construction of gratuitous donations by the state, I have not taken the trouble to cite the authorities which sustain it, but they are abundant and I think uniform. The case of *Hyman v. Read*, 13 Cal. 444, may seem to be an exception, but really is not. The conclusions there announced are based altogether upon a dissenting opinion of Judge Story, in a case in which the decision of the supreme court of the United States was to the opposite effect. (*Charles River Bridge v. Warren Bridge*, 11 Pet. 582, 600, 601.) But even the views of Judge Story, as expressed in that opinion, and the numerous authorities cited by him, are in entire accord with the proposition above stated. He makes the distinction between free gifts and grants upon a valuable consideration, and admits that the rule of strict construction applies to the former, and especially he admits “that where the terms of a grant are to impose burdens upon the public or to create a restraint injurious to the public interest, there is sound reason for interpreting the terms, if ambiguous, in favor of the public”; though at the same time he insists “that there is not the slightest reason for saying, even in such a case, that the grant is not to be construed favorably to the grantee, so as to secure him in the enjoyment of what is actually granted.” All that Judge Story contends for in that dissenting opinion may be freely conceded without affecting the conclusion that this grant to Oakland, as to which there can be no pretense of a valuable consideration, must be strictly construed.

As to the case of *Hyman v. Read*, *supra*, the discussion therein upon this point seems to have been entirely unnecessary, if not *obiter*, because there was really no ambiguity in the terms of the grant there in question. But, even if the point was involved, the decision recognized the distinction between a grant based upon a valuable consideration, and free gifts of the public domain, and this must have been the real ground of the decision, for the other reasons mentioned in that connection appear to be either unfounded or inconclusive. It is said, for one thing, that it was not a grant made at the suit or solicitation of the grantee. But how did this appear? Grants to a favored donee by a special act of the legislature, if gratuitous, are always presumed to have been solicited, and therefore the only reason for saying that the grant to San Francisco was not solicited was that it was not gratuitous, and so both of these grounds are resolved into the same thing. The third reason assigned, "that it is the deliberate public act of the legislature," is a perfect instance of arguing in a circle. Every gift of the public domain is made by public act of the legislature, and every such act is presumed to be deliberate. The proposition, therefore, amounts simply to this, that a public grant must be liberally construed because it is a public grant. It is only fair, however, to add to this analysis of the proposition a quotation from Judge Story's opinion which probably explains its real meaning. He says: "In the case of a legislative grant there is no ground to impute surprise, imposition, or mistake to the same extent as in a mere private grant of the crown. The words are the words of the legislature upon solemn deliberation and examination and debate. Their purport is presumed to be known, and the public interests are watched and guarded by all the varieties of local, personal, and professional jealousy, as well as by the untiring zeal of members devoted to the public service."

This is a beautiful theory, but it scarcely accords with the well-known fact that the legislature has but little time to deliberate upon the mass of bills brought before it, and that it is very often imposed upon, and oftener still mistaken as to matters vitally connected with the subjects of legislation. It would seem that all the reasons for protecting the king of England against his own improvidence in granting crown lands would apply with double force to grants by a modern legislature. In recognition of

this fact, our own legislature has made it statute law that "every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor." (Civ. Code, sec. 1069.) It is certain, moreover, that the principle of construction sustained by the weight of recent authority is that stated by Justice Shiras in his dissenting opinion in the Chicago case (*Illinois Cent. R. R. v. Illinois*, 146 U. S. 468), where he says: "It must be conceded, *in limine*, that, in construing this grant, the state is entitled to the benefit of certain well-settled canons of construction that pertain to grants by the state to private persons or corporations, as, for instance, that if there is any ambiguity or uncertainty in the act, that interpretation must be put upon it which is most favorable to the state; that the words of the grant, being attributable to the party procuring the legislation, are to receive a strict construction as against the grantee; and that, as the state acts for the public good, we should expect to find the grant consistent with good morals and the general welfare of the state at large and of the particular community to be affected."

These principles are equally applicable in the construction of every ambiguous term in the description of the boundaries of the town of Oakland, but resort to them is scarcely necessary in order to sustain the conclusion that the intention of the act was that the line on the estuary should cross the mouth of the eastern basin instead of ascending its outlet and passing around the main body. The legislative conception of the estuary is plainly indicated by the language of the act; it was regarded as a creek, or slough, with a head above the intersection of the northeast boundary line and a mouth in the bay, and the direction is, that the line shall follow "down the southerly line of said creek, or slough, to its mouth in the bay." In following this description there is no warrant for holding that on reaching the outlet from the eastern basin we are to stop following "down" the channel of the creek or slough, and turn aside to follow up this lateral affluent and around the wide, detached basin in which it has its source. The rule in surveying boundaries defined by streams or other waters is always to follow the stream or body of water, crossing the mouth of affluents or other inlets from headland to headland. Such was the method followed in surveying and patenting the pueblo grant of San Francisco, and considered in the case of

Tripp v. Spring, 5 Saw. 209, and in *Knight v. United States Assn.*, 142 U. S. 161. It is true that the decision of both of those cases was based upon the conclusiveness of the government patent against the state of California, and all persons claiming under the state, and that the true method of surveying the line on the bay was not necessarily or directly involved, but the question was directly and necessarily involved in all the proceedings in the courts, the land office, and the department of the interior, leading up to the issuance of the patent, and the method of survey approved by the department and followed in the patent was emphatically indorsed by the circuit and supreme courts. See, especially, the concurring opinion of Justice Field in the latter case, at pages 207 to 210, where, referring to the decision of the circuit court in the former case, among other things he says: "In addition to this fact, it may be observed that at the time the circuit court was not ignorant of the universal rule governing the measurement of waters, to which the supreme court of the state makes no reference in its decision, and of which it seems to have been entirely oblivious, that where a water of a larger dimension is intersected by a water of a smaller dimension the line of measurement of the first crosses the latter at the points of junction, from headland to headland." It may be objected that this doctrine in the terms stated is not applicable to the present case because the eastern basin of the estuary of San Antonio is, as a matter of fact, a water of larger dimension than the other branch above the junction. But to this objection, if it should be made, there are two answers. In the first place, according to the coast survey map of 1859, which is one of the exhibits in the case, the eastern basin is not the larger body at the junction which is the controlling point. In the second place, it is evident that the legislature which passed the act did not regard the northern branch as an affluent of the eastern branch, for they place its "mouth" in the bay, and not at the junction. If it should be contended that neither was regarded as an affluent of the other, but each considered of equal importance, it can only be said that there is nothing to sustain the contention, while there is in the language of the act, evidence to the contrary. But conceding the point for the sake of the argument, the necessary result would be that, in following a line "down" either branch to its

mouth in the bay, we could not ascend the other branch from the junction. This reasoning does not seem to me to require corroboration, but if it does the same conclusion must follow from the rule of strict construction above stated.

I assume then, as a proposition thoroughly established, that the eastern and southerly boundary of the town of Oakland extended along the line of low tide on the estuary crossing the inlet of the eastern basin at its mouth, and continuing to the mouth of the estuary in the bay.

The next term of the description which requires construction is "thence to ship channel." What did the legislature mean by "ship channel"? It has been assumed that they meant the three fathom line or the four fathom line in the bay. But this assumption, which pervades the entire argument of counsel for the city, and seems to have guided the defendant in all its dealings with the subject of the controversy for a long series of years, has, so far as I can discover, no tangible basis.

It is certain some meaning must be ascribed to the term "ship channel" in order to give effect to the act, and it must be some precise and definite meaning; for the law abhors want of definition in matters of boundary as nature abhors a vacuum. Especially is this true with respect to the boundaries of a municipal corporation invested with power and authority to make and enforce local laws, civil and criminal. It is not to be supposed that the legislature, in conferring the municipal franchise upon the inhabitants of a local district, will purposely leave its boundaries in any respect uncertain. On the contrary, it must be assumed that the intention was to mark the boundary so exactly and definitely that no question could arise as to whether a particular spot was within or without the local jurisdiction. It is true this presumption of a precise and definite intention on the part of the legislature in the enactment of laws is often opposed to the actual fact. It frequently happens that the framers of a law have no well-defined idea of what they desire to accomplish or no capacity to give expression to their ideas. In such cases the difficult task is imposed upon the courts of discovering a meaning that never existed. Such, I think, is really the case here. The act under consideration is in many respects confused, incoherent, and ambiguous. In the case of *Oakland v. Carpentier*, 13 Cal. 550, Bald-

win, Justice, in the course of his opinion refers to it in these terms: "The charter is, perhaps, the most defective upon the statute-book, and this is saying a great deal. A perverse ingenuity seems to have been exercised to make it as lame and loose as possible. The joint labors of Malaprop and Partington could scarcely have made such a collocation or dislocation of words and sentences." But, in spite of the possibility that the framer of the law did not himself know what he intended, and the certainty that if he had a definite idea he has failed to give it definite expression, we must hold that "ship channel" was a line capable of location on the ground, and must determine where it ran. That it was a line different from the line of high tide is rendered certain by the fact that the land granted is described as lying between the line of high tide and ship channel, but beyond this it cannot be said that anything is certain. A witness in the case (Allardt) testified that he should consider the eighteen foot (three fathom) line at low tide the boundary of ship channel, but he was testifying more than forty years after the enactment of the law, and there is nothing to show that prior to its passage the words "ship channel" in that collocation had ever acquired, by general or local usage or by legal enactment, any such meaning. The channel of a river, strait, or bay, in the technical sense of the term, means the deeper part which can be most safely navigated, but in this sense it cannot imply any fixed depth of water, for it is entirely relative to the particular river, strait, or bay to which reference is made, and the deepest portion of one body of water may be shallow compared to the channel of another. And in the same body of water the channel for vessels of lighter draft would generally be more extensive than the channel for vessels of heavier draft, as it certainly is in front of Oakland. Ship channel, therefore—in this sense of the word "channel"—had no definite boundaries in the bay of San Francisco at the date of the passage of the act, and it is a purely arbitrary assumption to say that the three fathom line was intended. It could be said with exactly as much plausibility that the legislature meant the four fathom line or the two fathom line.

But perhaps some light may be thrown upon this question by a consideration of previous acts in which the expression "ship

channel" occurs. Indeed, it would seem entirely reasonable to suppose that in two acts of the same legislature it was used on each occasion to signify the same thing. By the act of April 21, 1851, entitled, "An act providing for the disposition of certain property" (Stats. 1851, p. 305), there was granted to the town of Martinez a strip of tide land a half mile in length in front of the town, the outer boundary of which was "the line of ordinary ship's channel." The act, however, affords no clue to the meaning of these words, though it does very clearly evince the intention of the legislature that the land granted should be surveyed, subdivided, platted, and sold, and the proceeds used for the general improvement of the town, and particularly for the benefit of commerce by the construction of wharves, piers, docks, etc.

By the act of March 26, 1851, to provide for the disposition of the "beach and water lots" of San Francisco (Stats. 1851, p. 307), a permanent water front of the city was established. The boundary of this waterfront was traced along the outer edge of the outermost streets as delineated on the map of a survey that had been previously made of the city front, and which extended beyond the line of low tide a considerable distance out into the bay and to deep water. The survey terminated, however, at the intersection of the northern line of Jefferson street with the western line of Larkin street, and to define the waterfront from that point to the western boundary of the city it was provided that it should follow "the line of ship channel." Now here we have an indication of the meaning of the term. The waterfront established by law and ship's channel are coterminous—the line to which the city may extend its streets, and within which it may sell lots and authorize the purchasers to fill them up and occupy them, is waterfront. Immediately beyond is ship channel, and it includes all the space between the piers and wharves which by the act of May 1, 1851 (Stats. 1851, p. 311) the city was authorized to extend from the end of every street terminating at the waterfront two hundred yards out into the channel.

This meaning of the law seems to me to be a fair deduction from the fact that the point at the northwest corner of Jefferson and Larkin streets is at the same time on the line of ship channel and on that of waterfront. If the lines are coincident at one point, they must be coincident throughout as far as the survey

extends, and from the end of the survey to the western limits of the city the line of ship channel is nothing more nor less than the line to be fixed by the completion of the survey and legal establishment of the balance of the waterfront. I conclude, therefore, that the term "ship channel," as used in this earlier act relating to San Francisco, was intended to include all the navigable waters of the bay outside of what may be termed the bulkhead line as established by law.

But this does not fully solve the question as to Oakland, because there was not in 1852, and never has been, any law establishing a waterfront or bulkhead line in front of that city. We are, however, helped this far: ship's channel comprises the waters left free to navigation; and when we are required to locate its boundaries with precision, and no artificial boundary has been established by competent authority, we are driven to seek a definite natural boundary, if any such may be found, and here we do find such a boundary at the line of low tide. This is a definite line, and the only definite line beyond the line of high tide, and my conclusion is, that the line of low tide as it existed on the 4th of May, 1852, was the western boundary of the town of Oakland intended by the original act of incorporation. The only possible objection to this conclusion arising out of the terms of the act, so far as I can see, is that it is inconsistent with the implication of an interval between the mouth of the estuary and ship channel, contained in the words, "thence to ship channel." Of course, if we assume that the southern shore of the estuary at low-water mark is the southern boundary of the town, and the eastern shore of the bay at low-water mark is ship channel, there can be no interval between the mouth of the estuary and ship channel, and the words "thence to ship channel" must be rejected as superfluous. This, of course, would not be allowable if the whole description could be reconciled upon definite lines. But in fact it cannot; for, in addition to the impossibility of finding any definite line in the bay beyond low-water mark, there is another important and specific call in the description that must be rejected if we adopt the three fathom line or any other line of uniform depth in the bay that could be suggested. The call for the western boundary is "thence north-erly and easterly by the line of ship channel to a point where

the same bisects the said northeastern boundary line." But the three fathom line does not run northerly and easterly; it runs throughout its whole extent in a uniform northwesterly direction, whereas the line of low tide from the mouth of the estuary at low tide (this point is marked by the intersection of the United States government bulkhead line with the jetty walls) exactly fulfills this call in the description; that is, its course is northerly and easterly—a circumstance sufficient in itself to counterbalance the force of the words, "thence to ship channel," in the previous call.

The result of this discussion may be briefly summed up as follows: The boundary of the town of Oakland, as defined by the act of May 4, 1852, commencing at the intersection of the northeast line with the line of low tide on the eastern side of the northern branch of the estuary, follows the line of low tide on said branch to the mouth of the eastern basin, crosses said mouth and continues along the line of low tide on the southern side of the estuary to its mouth in the bay, and thence follows the line of low tide northerly and easterly till it intersects the northeastern boundary line, as to the location of which there seems to be no dispute. The grant to Oakland was of the lands lying between high-water mark and ship channel, within these boundaries, and therefore included nothing west of the line of low tide on the bay front, and nothing beyond the line of low tide on the north and west shore of the estuary. I say nothing was included beyond this line along the estuary, because the estuary was itself a part of the ship channel, and there was no part of the town between it and high tide on the south and east side. My reason for saying that the estuary was a part of ship channel is, that it was in fact navigable, and that fact had been recognized and declared by an act passed only one day before the passage of the act incorporating Oakland. (Stats. 1852, p. 182.) By this act the "stream called San Antonio creek" was declared navigable from its mouth to the old embarcadero of San Antonio, and all obstructions to its navigation were forbidden. It is true this act does not seem to have included the northern branch of the estuary, but, in the view I take of the matter, legislative recognition of the fact of navigability was not necessary to constitute a ship channel. The fact was itself sufficient, and the coast

survey map shows that the northern branch was navigable for every class of vessels that could go to San Antonio. Each branch had a depth of two feet at low tide—the same as the depth on the bar at the mouth of the estuary, which meant a depth at full high tide of from seven to eight feet every twenty-four hours, and this was sufficient to accommodate a very important traffic. The contention so much insisted upon that the estuary was not a natural harbor, but has only been converted into a harbor by the works projected and carried out by the government, seems to rest upon the assumption that no body of water deserves to be called navigable unless large vessels can enter it in its natural condition at any stage of the tide. It is certain that the legislature which passed the act under which both parties claim entertained a different view, and applied that view to this identical body of water.

Having thus, as I think, conclusively shown that the subject of the controversy was a grant of much more moderate dimensions than has been assumed in the argument, the way is opened to a consideration of the question of ownership. Has the land so granted always remained the property of the town and its successor, the plaintiff, or did it pass from the town or the city by any of the various methods in which the defendant claims to have derived its asserted title?

If the conclusion above stated is sound—if the grant to Oakland comprised only the strip of land bounded by the lines of ordinary high and low tide, and extending along the estuary and bay front of the town—the case is at once relieved of the question so much discussed in the argument as to the power of the legislature to make such a grant to a private corporation or natural person; and the only question to be considered is, whether the state has in this instance made the grant as claimed. For there is nothing in the doctrine established in the Chicago case to impeach the power of the legislature of California, or of any state, to alienate tide lands—by which expression I am to be understood as referring to those lands only which are covered and uncovered by the daily flux and reflux of the tides.

The question to be decided in the Chicago case was, whether an act of the legislature of Illinois was constitutional which repealed a former act making a grant to a railroad corporation

of a tract of submerged land on the harbor front of the city, about a mile and a half in length by a mile in breadth, and including the whole of the works constructed by the federal government for the improvement and protection of the harbor, and at all times covered by deep water. In order to decide this question, it became necessary, of course, to consider to what extent lands of this character are alienable by the state, and this necessarily involved a discussion of the nature of the ownership and dominion of the several states in and over such lands. The conclusions of the court upon these points and the doctrine thereby established are conceded to be a necessary part of its decision, and I not only do not dissent from them, I entirely approve them. Stated briefly, I understand the doctrine of that case to be that the several states hold and own the lands covered by navigable waters within their respective boundaries in their sovereign capacity, and primarily for the purpose of preserving and improving the public rights of navigation and fishery. They have in them a double right, a *jus publicum* and a *jus privatum*. The former pertains to their political power—their sovereign dominion, and cannot be irrevocably alienated or materially impaired. The latter is proprietary and the subject of private ownership, but it is alienable only in strict subordination to the former. No grant of lands covered by navigable waters can be made which will impair the power of a subsequent legislature to regulate the enjoyment of the public right. The grantee takes the mere proprietary interest in the soil, and holds it subject to the public easement, and, if his ownership of the soil stands in the way of public works necessary or likely to become necessary for the improvement of navigation and in aid of commerce, the grant may be revoked upon the tender of a fair compensation for such lawful improvements as may have been made by the grantee in pursuance of any express or implied license contained in the grant. But in perfect accord with this doctrine it was also held that the state might alienate irrevocably parcels of its submerged lands of reasonable extent for the erection of docks, piers, and other aids to commerce. It was further conceded to be a proper exercise of the power of the state to establish harbor lines and to authorize the reclamation of mud flats and shoals, where that could be done without

detriment to the public rights. The filling up of such lands, it was said, was often an improvement of navigation, and an advantage to commerce, and therefore lands susceptible of reclamation by that method may be alienated irrevocably. This, in general terms, is the doctrine of the Chicago case, and of the numerous decisions therein reviewed and commented upon. It is also the doctrine which has been distinctly announced by our predecessors in the former supreme court of this state. In *Ward v. Mulford*, 32 Cal. 372, Judge Sanderson says: "But by this we do not desire to be understood as holding that the Mexican government, or this state, has the same power of absolute alienation over lands held in virtue of their sovereignty which they have over other lands. The land which the state holds by virtue of her sovereignty, as is well understood, is such as is covered and uncovered by the flow and ebb of the neap or ordinary tides. Such land is held by the state in trust and for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery; and, whatever disposition she does make of them, her grantee takes them upon the same terms upon which she holds them, and of course subject to the public right above mentioned. But this restriction does not prevent her from disposing of them so as to advance and promote the interests of navigation. On the contrary, such a disposition of them would be in keeping with the purposes of the trust in which she holds them. Nor of reclaiming them from the sea, where it can be done without prejudice to the public right of navigation, and applying them to other purposes and uses. There are large tracts of salt marsh lands, of which the land in suit is an example, which are covered and uncovered by the flow and ebb of the neap tides, and therefore belong to the state by virtue of her sovereignty, which are of no possible use for the purposes of navigation, but may be valuable for agricultural or other purposes if reclaimed from the tides. Such lands the state may undoubtedly grant in private ownership for the purposes of reclamation and use, for by such a course no right of the public to their use for the purposes of navigation would be prejudiced.

On the contrary, the right of navigation, in many cases, might be subserved by such reclamation."

The same doctrine is recognized in *Taylor v. Underhill*, 40 Cal. 471, and was even more distinctly stated in *Eldridge v. Cowell*, 4 Cal. 80. There is no decision of this court which conflicts in the slightest degree with the doctrine of these cases, each of which recognizes the fact that the submerged lands of the state, though held and owned subject to a public trust, are nevertheless alienable in private ownership where capable of reclamation without detriment to the public right, and *a fortiori* where their reclamation will be of advantage to navigation and commerce.

A grant by the state of California, therefore, of mud flats and shoals between high and low tide on the margin of the bay of San Francisco cannot be held to have been in excess of the legislative power, in the absence of any proof that such grant has seriously impaired the power of succeeding legislatures to regulate, protect, improve, or develop the public rights of navigation or fishery, and in this case it does not appear that the grant to Oakland, as here construed, would have that effect if transferred to a natural person or private corporation.

It is true that the private ownership of the shore may prevent access to the navigable waters of the bay, but so does the private ownership of the upland prevent access to the shore and to the navigable waters in the same sense and to the same extent. This, however, is a minor and temporary inconvenience for which our laws and the laws of all civilized states provide an ample remedy. By the exercise of the right of eminent domain all necessary means of access from the uplands to the waterfront may be condemned for the public use, at a cost not in excess of the reasonable value of the land taken or subjected to the servitude. And there is no injustice in requiring this compensation to be made to the grantee of shore lands when his right to such lands is in other respects valid in law; for, like other holders of title derived from the state, he is presumed to have given what, at the time of the grant, was deemed a fair equivalent for the land granted.

With this cursory review of the doctrine of the Chicago case, and of our own decisions, I take leave of the question of the

power of the legislature of California to have made a valid grant of the land in controversy to Horace W. Carpentier or to the Oakland Water Front Company, and address myself to the more serious and difficult question, whether, in point of fact, the grant to the town of Oakland has been transferred to those parties, as claimed by the defendant, or has devolved upon and has remained in the city of Oakland, as claimed by the plaintiff.

The original grant, as we have seen, was contained in the act of incorporation of the town, the general features of which have been already stated. It will now become necessary to consider more particularly the specific terms and provisions of the act for the purpose of ascertaining to what extent and subject to what conditions the land so granted was alienable by the town and its successor, the city of Oakland.

By section 2 of the act (Stats. 1852, p. 181), the corporate powers and duties of said town were vested in a board of five trustees, and by section 3 it was enacted as follows:

"Sec. 3. The board of trustees shall have power to make such by-laws and ordinances as they may deem proper and necessary; to regulate, improve, sell, or otherwise dispose of the common property; to prevent and extinguish fires; to lay out, make, open, widen, regulate, and keep in repair all streets, roads, bridges, ferries, public places and grounds, wharves, docks, piers, slips, sewers, wells, and alleys, and to authorize the construction of the same, and with a view to facilitate the construction of wharves and other improvements, the lands lying within the limits aforesaid, between high tide and ship channel, are hereby granted and released to said town; provided, that said lands shall be retained by said town as common property, or disposed of for the purposes aforesaid; to regulate and collect wharfage and dockage; to secure the health, cleanliness, ornament, peace, and good order of said town; to organize and support common schools; to license and suppress dramshops, horseracing, gambling houses, and houses of ill-fame, and all indecent or immoral practices, shows, and amusements; to regulate the location of slaughter-houses, stables, and places for the storage of gunpowder, and to pass such other laws and ordinances as, in their opinion, the order, good government, and general welfare of the town may require."

This act of incorporation was approved May 4, 1852, and the town was immediately organized thereunder, Carpentier being elected one of the trustees, but failing to qualify.

On May 17, 1852, the board of trustees adopted the following ordinance:

"Section 1. The exclusive right and privilege of constructing wharves, piers, and docks at any point within the corporate limits of the town of Oakland, with the right of collecting wharfage and dockage at such rates as he may deem reasonable, is hereby granted and confirmed unto Horace W. Carpentier and his legal representatives for the period of thirty-seven years; provided, that the said grantee, or his legal representatives, shall, within six months, provide a wharf at the foot of Main street at least twenty feet wide and extending toward deep water fifteen feet beyond the present wharf at the foot of said street; that he or they shall, within one year, construct a wharf at the foot of F street or G street extending out to boat channel; and, also, within twenty months another wharf at the foot of D street or E street; provided, that two per cent of the receipts for wharfage shall be payable to the town of Oakland.

"Sec. 2. With a view the more speedily to carry out the intention and purposes of the act of the legislature, passed May fourth, one thousand eight hundred and fifty-two, entitled, 'An act to incorporate the town of Oakland and to provide for the construction of wharves thereat,' in which certain property is granted and released to the town of Oakland to facilitate the making of certain improvements; now, therefore, in consideration of the premises herein contained, and of a certain obligation made by said Horace W. Carpentier with the town of Oakland, in which he undertakes to build for said town a public school-house, the waterfront of said town—that is to say, all the land lying within the limits of the town of Oakland between high tide and ship channel—as described in said act, together with all the right, title, and interest of the town of Oakland therein, is hereby sold, granted, and released unto the said Horace W. Carpentier, and to his assigns or legal representatives, with all the improvements, rights, and interests thereunto belonging.

"Sec. 3. The president of the board of trustees is hereby charged with the duty of executing on behalf of the town of

Oakland a grant and conveyance in accordance with the provisions of this ordinance."

This was followed on May 31st by a deed of A. Marier, describing himself as president of the board of trustees of the town of Oakland, purporting to sell, transfer, grant, and release to Horace W. Carpentier, and his legal representatives, all the right, title, and interest of said town of Oakland in the land lying between high tide and ship channel within the corporate limits. This deed referred to the ordinance as authorizing it, and set forth the conditions subsequent upon which it was made, viz., the construction of the wharves, etc.

On December 30, 1852, another ordinance was adopted approving the wharf at the foot of Main street, and extending the time for completing the others.

On August 7, 1853, a third ordinance was adopted accepting another wharf and a schoolhouse, changing the site of the remaining wharves, and ratifying and confirming the ordinance of May 17, 1852. It further provided that "the said waterfront of the town as therein described is hereby granted, sold, and conveyed unto said Carpentier and his legal representatives in fee simple forever, with the right to erect wharves, piers, docks, and buildings at any and all points thereon not obstructing navigation, and to freely use and occupy the lands herein conveyed."

Numerous questions of a highly technical character have been raised by counsel for respondent as to the nature of the estate vested in Carpentier by these proceedings, assuming them to have been valid. But back of all these questions, and more important than all, is the question as to the power of the trustees of Oakland to transfer to Carpentier the entire waterfront of the town. If it shall be held that they possessed no such power, a critical examination of the deed and ordinances for the purpose of determining their technical sufficiency to transfer a fee simple estate in the lands described will be wholly unnecessary.

It ought not to require any very elaborate discussion in order to show that the attempted transfer to Carpentier of the whole of the lands granted to the town for the purposes declared in the act of incorporation was absolutely void. The power of the legislature to make a grant of these lands to a natural person, and the power of the municipal corporation to make the grant,

are two very different things. The corporation had no power to alienate these lands unless such power was conferred by the legislature, and whether it was conferred or not is a question of legislative intent to be gathered from the terms of the statute construed with reference to its general scope and purpose. The purpose of the act was to create a municipal corporation composed of the inhabitants of a peninsula surrounded on three sides by the navigable waters of the bay of San Francisco. Considering the extent of territory included within the corporate boundaries, it is evident that a rapid growth of population was anticipated, and the situation of the town, with relation to the surrounding country and the most important harbor on the coast, no less than the express language of the title of the act, proves that one of the most important ends contemplated in the creation of the corporation was the improvement of commercial facilities by the erection of convenient wharves along its waterfront.

To carry this principal, and other minor, purposes into effect, the municipal corporation was created and invested with a share of the sovereign political power to be exercised within the local boundaries. The trust thereby imposed upon the municipal government was public, and could neither be delegated nor abdicated. But, by the proceedings above recited, there was an attempt to do both, by investing a private citizen with the exclusive right to erect wharves and regulate tolls. In this aspect of the ordinance it is confessedly void, but counsel for appellant strenuously contend that the grant of the land was valid, and rested upon a lawful and sufficient consideration. I do not think so. The ownership of the land was essential to the exercise of the power. That this was fully understood is shown not only by the provisions of the charter, but by all the proceedings of the town trustees. At every step the two things went together, and in their very nature it is apparent that the one was necessarily bound up in the other. For how was it possible for the town to erect wharves after parting with its entire waterfront? It could only have done so by repurchasing the necessary sites, and it is not to be supposed that the legislature intended so absurd a consequence.

Undoubtedly, it was the intention of the charter that the lands comprising the waterfront should be disposed of in some manner, but the manner of their disposition was to be consistent with the purpose of the grant. The town council was invested with power, among other things, to lay out streets, and the plain intent of the law was, that the streets of the town should be projected to the waterfront, the intervening spaces divided into blocks and lots, and sold in subdivisions in such a manner as to preserve to the public ample means of access to the navigable waters of the bay and estuary, and to the municipal authorities ample space for the erection of wharves, piers, and docks. If any reasonable measures to this end had been taken, a sale of the lands by parcels would no doubt have been a proper exercise of power by the municipal authorities, but a transfer in bulk to a private citizen, without any reservation of the right of access to the navigable waters by which the town was almost completely surrounded, was a gross and evident excess of power.

Counsel for appellant have referred us to the numerous decisions affirming the validity of sales of the beach and water lots of San Francisco, but there is not the slightest similarity between the two cases. The grant to San Francisco was of the lots platted upon a survey showing streets extending to and along the permanent waterfront of the city, and authority to sell the lots was expressly conferred and was subject to no condition, express or implied, except the return of a percentage of the proceeds to the state. There was no other trust connected with the grant. The right of access to the waterfront, and of sites for wharves, etc., was secured in advance by a dedication of the streets connecting the upland with the ship channel, and covering its whole length. No power of the corporation was in the slightest degree impaired, and no right of the public infringed, by the sale of the lots bounded by these public highways. What had been done in San Francisco was indeed an example and a guide to Oakland in disposing of her waterfront, and I do not doubt that it was in contemplation of the legislature that substantially the same course should be pursued. Certain it is, at all events, that no such downright absurdity can be imputed to the legislature as an intention to vest the council with authority to cut the town off from access to the waterfront by

a transfer of the whole strip of shore lands at the same time that they were charged with the duty of erecting wharves, and when the construction of wharves was not only one of the declared purposes of the act, but was the express motive of the grant.

My conclusion upon this point is, the ordinances and deed of 1852-53, by which it was attempted to transfer the entire waterfront to Carpentier, were wholly void.

And no doubt this fact came to be well understood by Carpentier himself, for, as we shall see, he made various efforts from time to time to strengthen his title by legislative confirmation, purchases at execution sales, etc., and these are the matters to be next considered.

In the year 1854, as we have seen, the city of Oakland was incorporated as successor to the town, and with the same boundaries. Some time after its incorporation, it commenced a suit in equity to set aside the grant to Carpentier, on the ground of fraud, etc. A demurrer to the complaint was sustained, and the city declining to amend, judgment was entered in favor of defendants. On appeal to the supreme court, this judgment was reversed, and the cause remanded for further proceedings. (*Oakland v. Carpentier, supra.*) Before the case came to trial the second time the legislature passed the act of May 15, 1861 (Stats. 1861, p. 334), amending the charter of the city, which I have before cited in connection with the question of boundaries. This act, besides some trifling amendments relating to the rate of municipal taxes and the office of pound-keeper, attempted, as I have shown, to enlarge the grant of lands by giving a legislative construction to the original definition of the town boundaries, and, in addition thereto, amended section 12 of the act of 1854, by re-enacting it in these terms:

"Sec. 12. The corporation created by this act shall succeed to all the legal and equitable rights, claims, and privileges, and be subject to all the legal or equitable liabilities and obligations of the town of Oakland; and the ordinances of the board of trustees of said town are hereby ratified and confirmed, and the council shall have power to maintain suits in the proper courts to recover any right, or interest, or property, which may have accrued to the town of Oakland."

The amendment consisted in the insertion of the words "and the ordinances of the board of trustees of said town are hereby ratified and confirmed."

Upon the passage of this act Carpentier filed a supplemental answer in the case of *Oakland v. Carpentier, supra*, setting up the provisions of said section 12 as a legislative confirmation of his title, and when the case again went to the supreme court this point was very fully argued by counsel, but not decided by the court. (See *Oakland v. Carpentier*, 21 Cal. 642.)

In the present case, however, it becomes necessary to decide whether, by this amendment to the charter of the city, Carpentier was invested with title to the waterfront.

It was, as has been shown, clearly within the power of the legislature to grant these lands to Carpentier, and the only question to be decided is, whether that was the intention of the law. If such was the intention, it cannot be denied that he then became vested with a perfect title.

But the law cannot be so construed. Up to this point Carpentier had no title—his asserted grant from the town being absolutely void, and, therefore, if this amendment to the city charter had the effect of investing him with complete title, it was substantially a new grant by the legislature. For it is to be remembered that the pretended grant by the town had been utterly repudiated by its successor, the city, which was at that very time endeavoring by its suit in equity to have its title to the waterfront judicially established. We are to suppose, then, that the legislature intervened in this controversy, and, over the head of the city, transferred by its fiat the whole of the waterfront to a private citizen; and not only that, but that it conferred upon him the exclusive right for more than a quarter of a century to erect wharves, and regulate tolls and wharfage for a growing and ambitious city. For a confirmation of the ordinance of May 17, 1852, not only transferred the land in controversy, but sanctioned the abdication by the municipal authorities of their governmental functions in respect to wharves and tolls.

Of course, it is impossible to suppose that the members of the legislature actually intended to bring about this result, and

the only question is, whether they have used language which compels a construction to that effect.

The argument of the appellant is, that the language of the amendment necessarily includes all the ordinances of the town, and along with the rest the ordinances making and confirming the grant. In other words, the contention is, that the word "ordinances," as here employed, is to be taken in its widest and most comprehensive sense. But there is a well-recognized rule of construction of statutes which requires the rejection of the broadest sense of a word, even when it is its most natural and usual sense, if that is necessary in order to give effect to the true intent of the law, or to prevent a result at variance with its apparent purpose. The word "ordinance," however, in its usual and primary sense, means a local law—a rule of conduct prospective in its operation, and applying generally to the persons and things subject to the local jurisdiction. It does not, in its ordinary use or signification, include a grant of lands. Conceding it to be true that a grant of lands may be made by municipal ordinance, it is equally true that the idea of such a grant is not suggested by the use of the word, and this because it is a very unusual mode of granting lands. It is to be presumed, therefore, that in this instance the legislature used the word in its ordinary and restricted sense, rather than in a sense which would bring about a result at variance with the purposes evinced by other portions of the act. The title to the act, and its declared purpose, was to amend the charter of the city of Oakland, and it did make some trifling amendments really germane to the subject. As an amendment it became part and parcel of the charter—which, like the original charter of the town, conferred the power and imposed the duty upon the municipal authorities to construct wharves and regulate tolls. Can it be supposed, then, that by the general words of this amendment the legislature intended to deprive the city of the means of executing the powers imposed upon it, or that it intended to make a grant to a private citizen without a precedent in the previous legislation of the state, and without a parallel in its subsequent legislation? While it is true that the legislature had the power to make the grant, they will not be held to have made it unless their intention so to do has been clearly manifested, and

here certainly such an intention is more than dubious. There was nothing in the title of the act to suggest the idea of a grant to Carpentier, and such a grant was in no degree germane to the avowed purpose of the act. On the contrary, it was, as we have seen, at variance with some of the most important provisions of the charter. For these reasons I conclude that the amendment ratifying and confirming the ordinances of the town of Oakland must be held to apply exclusively to ordinances properly so called—that is, to the local laws of the town, and not to ordinances which were mere grants or attempted grants of the lands of the corporation—to ordinances adopted in pursuance of the legislative authority of the council, and not to ordinances which were in effect mere conveyances or attempted conveyances of the property interest of the town in its waterfront lands.

The rule of construction upon which this conclusion is founded is stated and illustrated in sections 113, et seq., of Endlich on Interpretation of Statutes, where the authorities which support it are fully cited.

In this connection I have not overlooked the case of *Thompson v. Thompson*, 52 Cal. 154, cited and relied on by appellant. But that case sustains the contention of counsel only to the extent that it holds or assumes that it is competent for the legislature to confirm or validate a void act of a municipal corporation. That the legislature has such power I have no doubt, but the question here is, whether it has attempted to exercise it to the extent claimed, and as to that matter *Thompson v. Thompson*, *supra*, is not in point, for the act there in question confirmed "all the acts and proceedings" of the trustees—a confirmation as comprehensive and universal as it could possibly be made. No construction of the language of that act could have excluded the transfer which it was held to have validated, and the transfer itself was of a character entirely consistent with the provisions of the charter.

It is to be regretted, I think, that a court should ever feel itself bound by rules of construction to give effect to statutes which ratify and confirm by wholesale the acts of municipal or other political agencies of the state. There is no more reckless or dangerous species of legislation. It is really legislating with the eyes shut, and under the mandatory and prohibitory provisions of

our present constitution is impossible. Under the old constitution, however, which, in respect to local and special legislation, titles of bills, etc., was construed to be merely directory, legislation of this character was possible, and ratifying laws passed while it was in existence, when clear and explicit, must be enforced, no matter how multifarious or incongruous may be the subjects which they embrace. They should, however, be closely scrutinized and strictly construed in order to prevent as far as possible the evils which they involve, and against which the framers of our present constitution have taken such strict and such necessary precautions.

The next contention of defendant is, that although Carpentier may have got no title by the ordinances of 1852-53 and the confirming act of 1861, still the final judgment of dismissal in the case of *Oakland v. Carpentier, supra*, estops the plaintiff upon the question of title.

The final judgment in that case was a dismissal in obedience to the mandate of the supreme court, and the opinion of that court (21 Cal. 667) shows that the validity of Carpentier's title was not determined. All that was determined was that the suit in equity could not be maintained, even if the grant to Carpentier was void. If it was void, the city could disregard it and assert her rights in any method appropriate to that state of the case.

The plaintiff is here pursuing the appropriate statutory remedy for establishing and enforcing her rights if the grant to Carpentier was void, and the judgment in *Oakland v. Carpentier, supra*, is no more an estoppel than the dismissal of a suit in equity upon the ground that there was a plain, speedy, and adequate remedy at law would be a bar to the appropriate action at law.

Defendant's claim of title, based upon the several execution sales of the waterfront under judgments against the town of Oakland, is the next point requiring notice. It is unnecessary to go into the details of these judgment and execution sales. A sufficient answer to all the claims based upon them is found in the conclusion above stated that the lands in controversy were held subject to the public trust of laying out streets through them to and along the waterfront, and of using them as sites for wharves, docks, piers, and other essential aids to commerce and to the

traffic of a seaport town. They were for this reason not subject to levy and sale under execution. (*Hart v. Burnett*, 15 Cal. 578.) The difference in the manner in which the waterfront of Oakland was held from that in which the beach and water lots of San Francisco were held has already been sufficiently stated, and demonstrates the inapplicability of the decisions—such as *Smith v. Morse*—holding that the water lots were the subject of execution sales.

The foregoing discussion brings us down in point of time to the year 1863, when the suit of *Oakland v. Carpentier*, *supra*, was finally dismissed, and results in the conclusion that Carpentier at that time had no title. The attempted transfer to him of the waterfront was void, and the city of Oakland was free to assert her rights by any action or other proceeding appropriate to that state of the case.

Carpentier, however, still asserted the validity of his title, and appears to have retained possession of such portions of the waterfront as he had found occasion to occupy by himself, his lessees and assignees.

In the year 1867, the authorities of Oakland again began to stir in the matter. A contract was made, or proposed, by which an attorney was retained for the purpose of recovering for the city the waterfront lands and the rights connected therewith. But before the commencement of any action or other proceeding for that purpose, a compromise of the claims of the city was proposed and accepted. At that time the transcontinental railroad was approaching completion, and the Western Pacific Railroad Company, which owned the franchise from Sacramento to San Jose, was projecting a branch line to a point on the bay at or near San Francisco. In order to induce that company to make its terminus at Oakland Carpentier offered them a portion of the waterfront claimed by him. They, however, had no confidence in the validity of his claim, and refused to consider his proposition unless the necessary steps should be taken to clear up his title. The whole matter was then submitted to the city authorities and their attorney, with the result that a compromise was agreed upon and subsequently carried out. The substance of this agreement was that the city should procure from the legislature the necessary authority to make the compromise,

that a small portion of the waterfront should go to the city and the rest be divided between the Oakland Water Front Company—a corporation of which Carpentier was the principal stockholder—and the railroad company. The principal consideration to the city, and its principal share in the compromise, was the establishment of the railroad terminus at the city front and the expenditure of five hundred thousand dollars in the erection of depots and other terminal works.

In pursuance of an understanding to this effect, application was made to the legislature and an act was passed March 21, 1868 (Stats. 1868, p. 222), as follows:

“Section 1. The council of the city of Oakland, with the concurrence of the mayor of said city, is hereby authorized and empowered to compromise, settle, and adjust any and all claims, demands, controversies, and causes of action in which the said city is interested.

“Sec. 2. This act shall take effect immediately.”

On March 31, 1868, all the parties interested, except the city, executed contracts in writing embodying the terms of the compromise, and on April 1st and 2d the following ordinances were duly adopted by the city council and approved by the mayor:

“The council of the city of Oakland do ordain as follows:

“Section 1. The claims, demands, controversies, disputes, litigations, and causes of action heretofore existing between the city of Oakland on the one part and Horace W. Carpentier and his assigns of the other part, relating to the force, validity, and effect of a certain ordinance passed by the board of trustees of the town of Oakland on the eighteenth day of May, A. D. 1852, and enrolled May 27, 1852, signed by A. Marier, president of the said board of trustees, and F. K. Shattuck, clerk of said board, entitled, ‘An ordinance for the disposal of the waterfront belonging to the town of Oakland and to provide for the construction of wharves,’ wherein and whereby, for the considerations therein named, ‘the waterfront of said town, that is to say, all the lands lying within the limits of the town of Oakland and between high tide and ship’s channel,’ as described in the act of the legislature for the incorporation of said town, passed May 4, 1852, together with all the right, title, and interest of said town therein, together with all the privileges, rights, and franchises

therein mentioned, were sold, granted, and released to Horace W. Carpentier and his assigns.

"And also in relation to the validity, force, and effect of a certain conveyance, executed and delivered to the said Carpentier, of the said waterfront, dated May 31, 1852, by the said Amedee Marier, president of said board of trustees, under and in pursuance of said ordinance.

"And also in relation to the force, validity, and effect of a certain other ordinance passed by the board of trustees on the thirtieth day of December, A. D. 1852, entitled, 'An ordinance to improve the wharf at the foot of Main street, and to extend the time for construction of other wharves,' which said ordinance was enrolled January 1, A. D. 1853, and signed by said president and clerk of the said board of trustees, wherein and whereby the said first-mentioned ordinance and the said deed of conveyance were recognized and approved.

"And also in relation to the force, validity, and effect of a certain other ordinance entitled, 'An ordinance concerning wharves and the waterfront,' passed on the twenty-seventh day of August, A. D. 1853, by said board of trustees, which said ordinance was enrolled dated August 27, A. D. 1853, and was signed by A. W. Barrell, president, and A. D. Hurlbutt, clerk, of the said board of trustees, wherein and whereby the said first-mentioned ordinance was in all things ratified and confirmed and the said waterfront again granted, sold, and conveyed to the said Carpentier in fee simple forever—are hereby compromised, settled and adjusted, and the said above-mentioned ordinances and conveyances are made valid, binding, and ratified and confirmed, and all disputes, litigations, controversies, and claims in and to the franchises and property described in said ordinances and deed of conveyance, and every part thereof, are abandoned and released by the said city of Oakland to the said Carpentier and his assigns upon the following conditions, to wit, that the said Carpentier and his assigns shall convey by proper and sufficient deeds of conveyance all the property and franchises mentioned and described in said ordinances and deed of conveyance hereinbefore referred to, to the Oakland Water Front Company, to be used and applied in accordance with the terms, conditions, stipulations, and agreements, contained in certain contracts between the said

Oakland Water Front Company and the Western Pacific Railroad Company and other parties, bearing even date herewith, with the exceptions in the agreement specified. But nothing herein contained shall be deemed to affect any rights of the San Francisco and Oakland Railroad Company derived under an ordinance of the city of Oakland passed the twentieth day of November, 1861.

"Passed April 1, 1868.

"B. F. PENDLETON,

"President of the Council.

"Attest: H. Hillebrand, City Clerk.

"Approved April 1, A. D. 1868.

"SAM MERRITT,

"Mayor."

"The council of the city of Oakland do ordain as follows:

"An ordinance entitled an ordinance to amend an ordinance entitled 'An ordinance for the settlement of controversies and disputes concerning the waterfront of the city of Oakland, the franchises thereof, and other matters relating thereto.'

"Section 1. The third clause of section 1 shall be amended to read as follows: And also in relation to the force, validity, and effect of a certain other ordinance passed by the board of trustees on the thirtieth day of December, 1852, entitled 'An ordinance to approve the wharf at the foot of Main street and to extend the time for constructing the other wharves,' which said ordinance was enrolled January 1, 1853, and signed by the said president and clerk of the said board of trustees, wherein and whereby the said first-mentioned ordinance and the said deed of conveyance were recognized and approved.

"Passed April 2, 1868.

"B. F. PENDLETON,

"President of the Council.

"Approved April 2, A. D. 1868.

"SAM MERRITT,

"Mayor."

"The council of the city of Oakland do ordain as follows:

"Section 1. It appearing to the satisfaction of the council that all terms and conditions of a certain ordinance heretofore passed,

entitled 'An ordinance for the settlement of controversies and disputes concerning the waterfront of the city of Oakland, the franchises thereof and other matters relating thereto,' having been fully satisfied and complied with by Horace W. Carpentier and his assigns, all the ordinances and deeds therein mentioned and described are hereby finally ratified and confirmed, and all disputes, controversies, claims, demands, and causes of action heretofore existing between the city of Oakland on the one part and Horace W. Carpentier and his assigns of the other part, relating to the force and validity of the said ordinances and deed, are hereby abandoned and released by the said city of Oakland to the said Carpentier and his assigns; provided, that nothing herein contained shall release the right of the city of Oakland to the reversion of the property, franchises, and rights released, as provided in the contract between the Western Pacific Railroad Company and the Oakland Water Front Company, in case said city of Oakland shall become entitled to same under said contract.

"Passed April 2, A. D. 1868.

"B. F. PENDLETON,

"President Council.

"Approved April 2, 1868.

"SAM MERRITT, Mayor.

"Attest: H. Hillebrand, City Clerk."

I am utterly unable to see any reason for denying the efficacy of this compromise.

By the very terms of the act the council, with the concurrence of the mayor, was authorized to compromise, settle, and adjust any and all controversies in which the said city was interested. This is very different from the paraphrase "its controversies," which counsel for respondent use in their argument. There is some plausibility in the contention that authority merely to compromise "its controversies" would not enable the city to alienate property held subject to a public trust, but authority to compromise, settle, and adjust any controversy in which it was interested, conferred by the same power that created the trust, is certainly comprehensive enough to sustain a transfer of the property subject to the trust.

Nor is there anything in the suggestion that there was no existing controversy with Carpentier to be compromised. If ever there was a flagrant and notorious controversy over anything, there certainly was such a controversy between Carpentier and the city of Oakland over this waterfront, and it was none the less a controversy because on the 21st of March, 1868, there was no action or legal proceeding actually pending in court. As to the alleged unreasonableness of the compromise, it can only be said to have been unreasonable in the sense that the city gave up too much and kept too little. But what the city should exact, or concede, in making the compromise was a matter confided to the discretion of the mayor and council, and, in the absence of fraud, their judgment is conclusive.

The conclusion, I think, necessarily follows that from and after the second day of April, 1868, the city of Oakland ceased to be the owner as trustee, or otherwise, of any portion of her waterfront except those portions secured to her by the compromise of that date, and such streets, thoroughfares, and other parcels as may have been previously dedicated to public use. As to all such places the transfer to the Water Front Company and its assigns was subject to the public easement, and the city as trustee for the public is no doubt entitled to a decree in this action defining her right of control over the lands so dedicated.

With respect to such streets and public places, the various consent decrees, relied upon by defendant, constitute no estoppel, and the statute of limitations does not apply.

It results from what has been said that the judgment on both appeals and the order denying a new trial must be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. It is accordingly so ordered.

Temple, J., and Van Fleet, J., concurred.

McFARLAND, J., concurring.—I concur in the judgment of reversal and in the conclusion reached in the opinion of the chief justice that the grant involved in this case, and the land claimed by the waterfront company is limited by the line of low tide on the westerly side, and on the estuary, and with respect to all other boundaries, by the lines designated in said opinion. In that view the case at bar is not within the Chicago case; and

with respect to the general power of the state to dispose of her lands lying under navigable waters within her borders, I express no opinion. As thus limited there is no question as to the power. I think that title to the land in contest passed to the grantor of the waterfront company before the compromise of 1868—at least by the confirmatory legislative act of 1861. In other respects I concur in the opinion of the chief justice and in the directions given therein to the court below.

GAROUTTE, J., concurring.—I concur in the judgment of reversal. The grant in this case should be confined within the smallest limits possible. The state should have the benefit of all doubtful constructions in matter of description, and for this reason the westerly line of the grant should be established at the point of low tide. In this respect I agree with the conclusion of the chief justice.

There is no trust relation existing between the state and its people which prevents the disposition of its tide lands. The title to such lands is in the state as perfect, full, and complete as title to land can vest; and, in the absence of statutory or constitutional law to the contrary, the state has the power to part with such title. This power has always been recognized and exercised by the state. It is the settled policy of the state. Acting under it, the state has parted with tens of thousands of acres. Indeed, it may be said that all such lands have passed from the state to private ownership. If, by some principle of law not to be found in constitution or statute, a trust rests upon these lands in favor of the public, a trust which, like the burden that rested upon Sinbad, can never be shifted, then every grant of such land by the state in the past is void, and the whole theory upon which the state has acted in the disposition of these lands has been wrong. That such result necessarily follows is plain, for this trust, if there be one, is a trust for all time, and attaches to every rood of tide land in the state. If the power exists in the state to release a single square foot from its embrace, that power exists to release it all; for, when quantity is considered, it becomes a question of policy and not one of power. I am satisfied no trust ever rested upon the tide lands of this state which prevents an absolute disposition of them.

Conceding the power of the state to vest the absolute title to these lands in the town of Oakland, did the state exercise that power? It is now claimed by the city of Oakland that it held these lands in trust from the state, and that it was an act *ultra vires* upon its part to dispose of them to Carpentier. Conceding for present purposes the soundness of this contention, still the city has no prop to depend upon for support. This is so because the city of Oakland transferred the title to these lands to Carpentier by ordinance, and subsequently the state legislature, by act of 1861, ratified and confirmed "all the ordinances" of the town of Oakland. This ordinance answered to that description; it came within that class; and this court is bound to assume that the legislature meant what it said. The confirmation and ratification of this ordinance by the state legislature made the grant to Carpentier a legislative grant; and such grant for all purposes stood as a direct grant to him from the state. The views here expressed refer to tide lands not covered by navigable waters. As to lands under navigable waters I leave the question open.

HARRISON, J., dissenting.—I am unable to agree with the conclusion reached by a majority of the court. The plaintiff brought this action to quiet its title as against the defendant to certain lands lying below the line of ordinary high tide of the bay of San Francisco and the estuary of San Antonio, and within the boundaries of the city of Oakland, as defined in the act incorporating said city, April 24, 1862. The cause was tried by the court, and judgment rendered in favor of the plaintiff that as to the lands described in the complaint, with the exception of certain designated parcels described in the judgment, the title of the plaintiff is good and valid, and is vested in and held by it as a public corporation and governmental agency of the state of California for the common benefit of all the people of the state and the whole public; and that, as to certain parcels described in the judgment and which are found to have been filled in and raised above the level of ordinary natural high tide, the plaintiff has lost and the defendant has acquired the title in fee thereto, and the defendant's title thereto is good and valid; and also that the plaintiff is not the owner of that part of the land described in the complaint which lies southwardly from the present southern boundary line of the city of Oakland. A motion for a new

trial was made by the defendant and denied, and from the judgment in favor of the plaintiff and the order denying a new trial the defendant has appealed.

The town of Oakland was incorporated by an act of the legislature May 4, 1852 (Stats. 1852, p. 180), with the following boundaries: "On the northeast by a straight line at right angles with Main street, running from the bay of San Francisco on the north to the southerly line of the San Antonio creek or estuary, crossing Main street at a point three hundred and sixty rods northeasterly from 'Oakland House,' on the corner of Main and First streets, as represented on Portois' map of 'Contra Costa' on file in the office of the secretary of state; thence down the southerly line of said creek or slough to its mouth in the bay; thence to ship channel; thence northerly and easterly by the line of ship channel to a point where the same bisects the said north-eastern boundary line."

Section 3 of the act incorporating the town declares: "The board of trustees shall have power to make such by-laws and ordinances as they may deem proper and necessary; to regulate, improve, sell, or otherwise dispose of the common property; to prevent and extinguish fires; to lay out, make, open, widen, regulate, and keep in repair all streets, roads, bridges, ferries, public places, and grounds, wharves, docks, piers, slips, sewers, walls, and alleys, and to authorize the construction of the same, and, with a view to facilitate the construction of wharves and other improvements, the lands lying within the limits aforesaid, between high tide and ship channel, are hereby granted and released to said town; provided that said lands shall be retained by said town as common property, or disposed of for the purposes aforesaid; to regulate and collect wharfage and dockage, etc."

May 18, 1852, the trustees of the town of Oakland adopted an ordinance entitled "An ordinance for the disposal of the waterfront belonging to the town of Oakland, and to provide for the construction of wharves." The ordinance is in the following terms:

"Section 1. The exclusive right and privilege of constructing wharves, piers, and docks at any points within the corporate limits of the town of Oakland, with the right of collecting wharfage and dockage at such rates as he may deem reasonable, is hereby

granted and confirmed unto Horace W. Carpentier, and his legal representatives, for the period of thirty-seven years; provided, that the said grantee or his representatives shall, within six months, provide a wharf at the foot of Main street at least twenty feet wide and extending toward deep water fifteen feet beyond the present wharf at the foot of said street.

"Sec. 2. With a view the more speedily to carry out the intentions and purposes of the act of the legislature passed May 4, 1852, entitled, 'An act to incorporate the town of Oakland, and to provide for the construction of certain wharves thereat,' in which certain property is granted and released to the town of Oakland to facilitate the making of certain improvements, now, therefore, in consideration of the premises herein contained, and of a certain obligation made by said Horace W. Carpentier with the town of Oakland in which he undertakes to build for said town a public schoolhouse, the waterfront of said town, that is to say, all the lands lying within the limits of the town of Oakland between high tide and ship channel, as described in said act, together with all the right, title, and interest of the town of Oakland therein, is hereby sold, granted, and released unto the said Horace W. Carpentier, and to his assigns or legal representatives, with all the improvements, rights, and interests thereunto belonging."

Section 3 provided for the execution of a conveyance of said lands to Carpentier by the president of the board of trustees. By virtue of this ordinance the president of the board of trustees, A. Marier, executed to Carpentier a conveyance of the land May 31, 1852. The interest thus conveyed to Carpentier became vested in the defendant herein prior to the commencement of this action, and the lands so conveyed to him are included within the description contained in the complaint herein.

The plaintiff was originally incorporated by an act of the legislature passed May 25, 1854 (Stats. 1854, p. 187), and succeeded to all the rights and claims of the town of Oakland in said lands; and was reincorporated in 1862 (Stats. 1862, p. 337), and was then empowered to maintain suits to recover any right or interest to property which may have accrued to the town and city of Oakland.

The court below held that the foregoing ordinance, and the deed of Marier purporting to sell and dispose of the lands therein described were null and void, and that said board of trustees had no right or power to pass said ordinance, and said Marier had no right or power to execute said instrument in pursuance thereof. The correctness of this finding underlies the decision of the court and the rights of the parties hereto, and has properly received the main consideration in the argument of counsel and by the court in determining the case.

The questions thus presented for determination are the nature or character of the tenure by which the state holds the title to the tide lands within its borders, and the effect of the act granting these lands to the town of Oakland, and also the interest in the land which was taken by Carpentier by virtue of the ordinance, as well as the effect of subsequent legislative acts and judicial proceedings.

1. The nature of the state's title to tide lands and lands covered by navigable waters, as well as the effect of a conveyance of these lands by a grant, either directly from the legislature or through legislative authority, has been the subject of frequent consideration by the courts, and many expressions are found in opinions given in deciding the cases in which the title is characterized as that of an absolute owner in fee. The cases in which the question has been considered have in nearly all instances, however, been those in which the right to the disputed lands was controverted by individuals claiming the same as against each other by virtue of conflicting grants or claims derived under the state, or when the rights of a grantee of the state were opposed to one claiming by prescription, or by virtue of a riparian claim, or to a claim alleged to be paramount or anterior to that of the state, and have arisen only where limited areas were involved. In these cases courts in determining the title of the grantee under the state have characterized the original title of the state thus conveyed to him as that of a sovereign with the full power of disposition; but, as was said by the supreme court of the United States in discussing this question in the Chicago case hereinafter cited: "General language sometimes found in opinions of the courts expressive of absolute ownership and con-

trol by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases." In *Weber v. Harbor Commrs.*, 18 Wall. 57, the facts pertinent to the lands then in question did not require an investigation or determination of the nature of the state's title, but the court in its opinion declared that the state had "absolute property in and dominion and sovereignty over all soils under the tide waters within her limits, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations, or among the several states." Similar expressions may be found in opinions in other cases, but in none of these cases prior to that of *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387, was the question directly presented as between the rights of the grantee and the rights of the public remaining in the granted lands, or the extent to which the state had the power to grant such lands, or whether there were any limitations upon the exercise of this power. In that case the state of Illinois had attempted to alienate certain lands beneath the waters of Lake Michigan, which included a large portion of the waterfront of Chicago, and the supreme court of the United States was for the first time called upon to consider the extent to which the right of the state to grant lands thus held for public use could be exercised without impairing the rights of those for whose benefit the trust existed, and in so doing pointed out more clearly than had been previously done the nature of this tenure, and that there are limitations upon the right of the state to dispose of such lands. In its opinion in that case it modified its previous declaration in *Weber v. Harbor Commrs.*, *supra*, of the state's power of disposition of such lands, by inserting the qualification "when that can be done without substantial impairment of the interest of the public in the waters."

The expressions found in many of the opinions, and repeated in the foregoing quotation from *Weber v. Harbor Commrs.*, *supra*, that the state holds the dominion and sovereignty over these lands, as well as the frequent statement that the state is sovereign, is apt to be misleading unless the proper significance of the

term "sovereign" when thus used is also considered. To the extent that the state is not subject to any superior control or authority it is sovereign, but it does not follow that it has absolute authority, or that its power of disposition over these lands is without limitation. Under the political system of this country the actual sovereign is the people, and all power of government and ownership of public property is vested in them, and is to be exercised solely for their benefit. The state is but the organized form of government which the people have established for their protection, both as individuals and as a body politic, with powers defined in a written constitution, and is sovereign only to the extent with which the people have invested it with their sovereignty. Being only a political entity, the powers and sovereignty thus conferred by the people must be exercised by individuals, and the exercise of the power under consideration has been intrusted to the legislature. The legislature is, however, only the agent and representative of the people, and holds the power and sovereignty conferred upon it in trust that they shall be exercised in the interest and for the benefit of its constituent, and subordinate to the trust under which they are held. As in the case of any other agent or trustee, an act done by it for the purpose and with the necessary result of injuring its principal, or of destroying the subject matter of the trust, even though done under the forms of the authority conferred upon it, will be held ineffective.

Whatever power or sovereignty has been conferred upon the state to be exercised only for the benefit and in the interest of the entire people, cannot be abdicated or surrendered to individuals, or exercised in favor of some to the detriment or disadvantage of others. The lands which the state holds in trust for the entire public are held by it in this limited sovereignty, and under the same trust as is the police power, or the power of taxation, or the right of eminent domain, and for the same reason are incapable of being placed beyond its control. Although the state is vested with the dominion and sovereign control of these lands, it does not follow that its power of disposition is the same as that of an individual over lands of which he holds the absolute fee, or that its tenure of the lands is identical with that of an individual owner. These lands are not held for the purposes of

sale, or for producing revenue or income therefrom, but are universally declared to be held for the use and benefit of the public, and the power of alienation, as well as the title of the state thereto, is limited by this trust under which they are held. In *Illinois Cent. R. R. Co. v. Illinois*, *supra*, it was said that the title of the state to these lands "is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. . . . The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. . . . The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instances of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government, the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers, and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state."

The question of the unlimited power of the legislature to grant these lands into private ownership may be fairly presented for

consideration by assuming that that body could be induced to make a grant to an individual or to a corporation of all the tide lands and lands covered by navigable waters belonging to the state. Irrespective of the constitutional limitation in this state against gifts of public property, it would not be contended for a moment that such a grant could be sustained. "A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation." (*Illinois Cent. R. R. Co. v. Illinois, supra.*) It was said by the supreme court of New Jersey in *Arnold v. Mundy*, 6 N. J. L. 1, 10 Am. Dec. 356: "The sovereign power itself cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people." A grant to an individual of all of the land covered by the Sacramento river, or lying within the ebb and flow of the tide thereon, would manifestly be beyond the power of the legislature; but a grant of the entire waterfront of a municipality, by which all ingress and egress between the upland and the navigable waters bordering thereon is cut off or placed at the arbitrary will of an individual, differs only in degree from a grant of the bed of the Sacramento river or of the waterfront of the entire state. It was shown by testimony in the present case that the distance from the line of ordinary high tide to ship channel, measured along the northeasterly boundary of the town of Oakland, as defined in the act of 1852, is upward of five miles, and that, by reason of the diverging lines of its north and south boundaries, the tract of land between the line of high tide and ship channel is in the shape of a fan, widening as it extends into the bay, so that the frontage at the line of ship channel is about seven miles. The court found as one of the facts herein: "The length of the shore line of the tract of land described in the complaint, measured on the line of ordinary natural high tide, is thirteen and fifty-six hundredths miles; the length of its frontage upon the channel lines is thirteen miles, and the area of said tract of land is about seven thousand eight hundred and seventy acres."

It neither needs nor admits of argument or evidence to make it manifest that the state cannot make a grant of this extent without "a substantial impairment of the interest of the public in the waters" covered by the grant, as well as those bordering thereon. That a waterfront may be available to the public it must be capable of approach from both sides, from the water to the land, as well as from the land to the water; but by the terms of this grant there is drawn in front of the entire upland a cordon of land miles in width, making ingress and egress between the land and the water impossible, except at the will of the grantee. If the state had the power to authorize this grant, it could authorize similar grants by every municipality, and could organize municipalities by which the entire water frontage of the state would be occupied. If the state can irrevocably part with its dominion over the entire waterfront of Oakland, it can do so with the entire waterfront of any and every municipality within its borders, and it is only necessary to conceive of similar grants to Alameda, Berkeley, San Pablo, and other towns bordering upon the bay and elsewhere, in order to see the state deprived of its entire sovereignty and control over these lands, as fully as though they had all been granted by a single legislative act. No instance has been cited of a grant approximating in extent the one under consideration, and we do not hesitate to say that no court has ever sustained the validity of a grant of this extent.

The principles thus declared do not, however, prevent the state from conveying by its grant an absolute fee to parcels of these lands, and the cases in which such grants have been upheld illustrate the extent to which the grants may be made, as well as their limitations. As one of the main purposes of the trust under which they are held is that the public may enjoy them for the benefits of commerce and navigation to be derived therefrom, the state, as the organized representative of the public, may, in its administration of that trust, find it to be for the advantage of the public, and in promotion of the purposes of the trust, as well as to secure the benefits of navigation and commerce, to construct docks, wharves, piers, or basins upon the lands covered by these waters, and for that purpose may authorize their construction by others, and may part with the title to the land upon which they are constructed. It was said in the Chicago case:

"The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purposes the state may grant parcels of the submerged lands, and, so long as their disposition is made for such purpose, no valid objections can be made to the grants." And in the same case the court further said that the grants that have been considered and sustained in the adjudged cases as a valid exercise of legislative power have been "grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining"; and that "it is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled." The grant of a parcel of land which may serve as the foundation for a wharf or a pier, and which is actually used for such purpose, would be within the direct purposes of the trust for which the lands are held by the state; and it may also be conceded that if lands covered with water are granted by the state, and are afterward reclaimed and occupied for purposes not connected with commerce and navigation, but in such a way as not to impair the rights of the public in the waters still remaining, leaving them open to free access from the upland, the state would not be at liberty to recall the grant. This is, however, an entirely different proposition from a grant of the entire waterfront of a city or township, either as a donation or upon the consideration of constructing a single wharf thereon, or the construction of some public improvement disconnected with the use of the lands.

The state cannot part with the control of these lands for other public uses than those for which they are held, or than such as will promote the interests of the public in navigation and commerce, and is precluded from alienating them for other purposes. The same considerations which prevent it from making a donation of them to an individ-

ual for his own private purposes preclude it from alienating them for other public purposes than those for which they are held in trust. "The trust for which they are held is governmental, and cannot be alienated except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining." (*Illinois Cent. R. R. Co. v. Illinois, supra.*) The legislature can no more extinguish or destroy the right of the public in these lands by exchanging them for lands or property to be used for other public purposes than it can by alienating them *in solido* by a legislative grant. Whether the state may appropriate the moneys it shall receive for such portions as it may lawfully sell to other public purposes need not be considered, nor is it necessary to consider the extent of the parcels which it may dispose of, or whether the judgment of the legislature as to the extent of such disposition is final. A grant by the legislature is the act of a co-ordinate branch of the government, and, so long as its right to make the grant is an open question, the judiciary are not justified in refusing to give it effect. (*Madera Irrigation Bonds*, 92 Cal. 310; 27 Am. St. Rep. 106.) If a contest upon this question is presented to the courts, they would be authorized to determine it to the same extent as they are authorized to determine whether the purpose for which taxation or the right of eminent domain is authorized is a public purpose, or whether the use for which private property is taken in any particular instance is a public use. If the exercise of this power in any given case lies upon the border line, or is equally susceptible of a construction in favor of as against its validity, courts will respect the determination of that branch of the government and refuse to question its exercise; but if it is apparent from the terms of the grant itself that it is in excess of the power of the legislature, or is in violation of the trust upon which the lands are held by the state, courts will no more hesitate to pronounce the grant invalid than to declare any other act of the legislature without effect that has been passed without authority. If the grant be of an entire harbor, or if it purports to grant in a single tract all the land forming the water approaches to a basin or city, there can be no question of its invalidity.

The fact that at the time of the passage of the act and the grant thereunder Oakland had but a fraction of the population which it now possesses, or that the value of the land granted was small, is immaterial and a false quantity in determining the power of the legislature. The trust under which the lands were held was not limited to that date, but extended throughout the existence of the state for all time, and the lands were held for future generations as well as for those then capable of enjoying them. In the Chicago case, the grant was of only a portion of the lake front and extending nearly a mile out into the lake. At the time when it was made the population of the city was not one-fourth what it was when the decision thereon was rendered, and when the validity of the grant came before the courts for determination the city had extended for miles further south, but it was not contended that these facts in any respect affected the validity of the grant or the power of the legislature at the time it was made.

Neither is the right of the defendant in these lands increased by the fact that other tracts of land of great extent have been conveyed by the state. The facts connected with those grants are not before us, and we would not be justified in expressing an opinion upon their validity. The grant to San Francisco by the act of March 26, 1851 (Stats. 1851, p. 307), is peculiarly within the conceded right of the state to dispose of these lands in parcels for the purpose of promoting the interests of commerce and navigation. The land which was granted by that act was that which was situate within certain boundaries, "according to the survey of the city of San Francisco, and the map or plat of the same now on record in the office of the recorder of the county of San Francisco." The land within these boundaries had been laid out into lots and blocks, with streets intersecting the blocks, and also along the waterfront and extending therefrom to the upland, and in the act itself these lots were designated as "the San Francisco beach and water lots." The map had been drawn in accordance with a survey made in 1847 by virtue of the directions of General Kearny, and the beach and water lots designated thereon, each with an area of one-third of a fifty vara lot, and seven hundred and seventy-two in number, had been sold at public auction under the direction of the ayuntamiento

prior to the incorporation of the city, and at the passage of the act were claimed in private ownership, and the grant to the city was for the purpose of releasing to these grantees the right of the state therein, and of confirming their claim thereto. (See *Eldridge v. Cowell*, 4 Cal. 80.) The grant to the city was of the use and occupation of the land for a limited period, with the right to dispose of the same, and providing that the title thus conferred should inure to the benefit of her previous grantees. Section 4 of the same act provided that the boundary line described in the first section of the act should be and remain a permanent waterfront of said city, and that the authorities of the city should keep the space beyond said line, to the distance of five hundred yards therefrom, clear and free from all obstructions whatsoever; and, as if to emphasize the purpose of the state not to part with its control over the waters, it was declared in section 6: "Nothing in this act shall be construed as a surrender by the state of its right to regulate the construction of wharves or other improvements so that they shall not interfere with the shipping and commercial interests of the bay and harbor of San Francisco." At the same session of the legislature another act was passed (Stats. 1851, p. 311), by which the city of San Francisco was authorized "to construct wharves at the ends of all streets commencing at the bay of San Francisco, the wharves to be made by the extension of said streets into the bay in their present direction, not exceeding two hundred yards beyond the present outside line of the beach and water lots, and to prescribe the rates of wharfage that shall be collected on said wharves when constructed. The space between said wharves when they are extended, which is situated outside of the outer line of beach and water lot property, as defined by the legislature, shall remain free from obstructions and be used as public slips for the accommodation and benefit of the general commerce of the city and state." When the state afterward authorized the disposition of its reversion in the property thus granted to the city, it directed that the property be sold "by lots as the same are now laid out on the official map of said city, and, where none such are so laid out, then in such lots as may be laid out by the board in conformity with the said official map." (Stats. 1853, p. 219.)

The state does not violate the trust under which it holds the title to these lands by designating a waterfront at a line within a reasonable distance from the line of high tide, and at the same time providing for the construction of wharves and piers at that line, since this is in the direct interests of commerce and navigation and is also in execution of said trust. Whether such waterfront should be at the line of high or low tide, or at a point below that, would depend upon the conformation of the shore and the distance between it and deep water. Upon the designation of the line of such waterfront, and providing means of access thereto from the upland sufficient to meet the present and prospective necessities of commerce, the lands within this line not so reserved would cease to be subject to the trust upon which they were previously held, and the state could either reclaim them itself, or it could dispose of them as freely as it can of any other lands held by it merely in its proprietary right. The principle, however, under which such action by the state is upheld, is entirely inconsistent with a grant by it of the entire space between the line of high tide and ship channel in which no line is designated for a waterfront, or provision made for access to the waters from the upland, or for the construction of wharves at any point within the granted lands, and in which no obligation is imposed upon the grantee to construct any wharves therein or to make any provision for the necessities of commerce and navigation.

It follows, therefore, that by the act of 1852 the legislature did not confer upon the town of Oakland the title in fee to the lands within its limits then lying below the line of high tide, or the right to dispose of the same as an entirety or by a single grant, and that the ordinance passed by the town granting the said lands to Carpentier, as well as the conveyance executed to him by Marier in pursuance thereof, were invalid to vest in Carpentier any title to said lands or to any part thereof. The legislature could not give to the town of Oakland any greater power to alienate or dispose of these lands than was possessed by itself, and the grant by the town to Carpentier must be regarded as taken by him with full notice of the limitations upon the power of the legislature, and with the same effect as if it had been made directly to him by the legislature itself in the terms of the act.

2. The defendant, in a separate answer to the complaint, pleaded that by reason of a judgment rendered in a former action between its predecessor and the plaintiff, the plaintiff is estopped from maintaining the present action. The facts upon which the alleged estoppel rests are as follows: In 1857 the plaintiff herein commenced an action against Carpentier for the purpose of having the aforesaid ordinance and grant adjudged to be null and void, alleging in its complaint that by the act of 1854 it had succeeded to the rights of the town of Oakland; that by virtue of the act of 1852, incorporating the town of Oakland, a grant was made to the town of the lands described in that act; that by the second section of the act the corporate powers of the town were to be exercised by a board of five trustees; that, although five trustees were elected, only four qualified and acted; that at a meeting of these four a resolution was passed by which they pretended to convey to Carpentier "the exclusive right and privilege of constructing wharves, piers, and docks at any point within the corporate limits of the town of Oakland, with the right of collecting wharfage and dockage as he might deem reasonable, upon certain conditions in said ordinance particularly set forth"; that "by the same pretended ordinance, and for the considerations therein set forth, a pretended grant was made to the said Carpentier of all the improvements, rights, and interests belonging to the said town, and to the lands lying within the limits of the town of Oakland"; and that thereafter the president of the board of trustees made a conveyance in pursuance of said ordinance, which purported to convey to Carpentier the exclusive right and privilege of constructing wharves and collecting wharfage for the period of thirty-seven years," together with all the right, title, and interest of the town of Oakland in and to the waterfront of said town, and situated between high tide and ship channel, as granted to said town and as described in said last-mentioned act of the fourth day of May, 1852, upon the conditions and for the considerations set out in said deed." The plaintiff in said action therefore charged that "the said corporation was not, at the time of the passage of the said ordinances, lawfully constituted under the provisions of the said act, and that all the actings and doings purporting to be the acts of said corporation, including the said pretended

ordinances and deed made in pursuance thereof, are absolutely null and void, and confer no rights on said pretended grantees"; "that the said pretended deed of the twenty-seventh day of May, 1852, to said corporation is void and of no effect, because it is not made under the seal of the said corporation"; that "the exclusive right to collect wharfage and dockage was a franchise conferred upon said corporation by the legislature for the use and benefit of all the inhabitants of said town, and as such it had no power or authority under the act of incorporation to alienate or transfer the same." It was further alleged that Carpentier had acted fraudulently in procuring the said pretended grant, and in procuring other grants and ordinances, and the various particulars in which the fraud was charged were set forth in said complaint, and the plaintiff therefore charged "that the above-mentioned ordinances and deeds constitute a cloud on the title of the plaintiff, and embarrasses the city in the exercise of the legitimate functions appertaining thereto"; and prayed "that the said pretended ordinances and deeds may be declared null and void and of no effect, and that the defendant be directed to deliver up to the plaintiff the property pretended to be conveyed by said deeds and ordinances." To this complaint the defendants answered, denying the averments in the complaint with reference to the incorporation of the town of Oakland, and denying that the actings and doings purporting to be the acts of said corporation, or any of them, were null and void, or conferred no rights upon Carpentier, or that the deed from the corporation to him was void or of no effect, or that the exclusive right to construct wharves, with the exclusive right to collect wharfage, was a franchise which the corporation had no power to alienate and transfer; and also denied "that the said ordinances and deeds in the said complaint mentioned, or any of them, constitute a cloud on the title of the plaintiff, or embarrasses the city in the exercise of the legitimate functions appertaining thereto, or in any other manner." The defendant also denied the several allegations of fraud charged in the complaint, and, in addition to these denials, affirmatively alleged the incorporation of the town, the election of its trustees, their organization and adoption of the ordinance granting the land to Carpentier, setting forth the ordinance at length, the conveyance thereof to him by

the president of the board, the acceptance of the grant by him, and the agreement on his part to perform the conditions therein imposed, and his subsequent performance thereof, and that by reason thereof he had become vested with the title to the lands in question, and that the plaintiff was estopped from maintaining its said action.

The cause was tried by the court and judgment rendered in favor of the plaintiff. From this judgment an appeal was taken to the supreme court, and the judgment of the trial court was reversed by that court, and the district court was directed to dismiss the suit. (*Oakland v. Carpentier*, 21 Cal. 642.) In its opinion rendered upon deciding the appeal, the supreme court, after reciting the facts in the case, said: "The suit is, of course, for equitable relief, and the grounds alleged for the interposition of equity are that the grant or conveyance was obtained by fraud on the part of Carpentier, and was made without authority on the part of the trustees, and that it constitutes a cloud upon the title of the city, and embarrasses her in the exercise of her legitimate functions"; and, after stating that the charges of fraud were not entitled to consideration by reason of their vague and indefinite character, as well as by the fact that they were fully denied and wholly unsustained by the proofs, the court further said: "Stripped of the charges of fraud, the whole claim for equitable relief falls to the ground. The grant was either valid, or void or voidable. If void, as contended by the counsel for the respondent, there can be no occasion for the interference of a court of equity. If void, the condition of things—of the rights, privileges, and estate of the city—remains as though no transfer had been attempted. No cloud is cast upon her title, and no embarrassment can attend the exercise of her legitimate functions. She has only to proceed and assert her privileges and claim her interests, and whoever interferes with them will be a trespasser. If, however, the grant is only voidable, and not void, the plaintiff seeking the aid of a court of equity can only obtain equity by doing equity—that is, she can only obtain relief from the acts of the agents of the town by tendering compensation to the defendant, who has relied upon them for his expenditures. . . . The conclusion which follows from the views we have expressed is evident. The charges of fraud as a ground

for the equitable interposition of the court are fully answered, and must be left out of the case. If the ordinances of the board granting the franchises and lands to Carpentier are void, there is no occasion for the interposition of equity. If they are only voidable, that interference cannot be invoked until equity is done by the plaintiff claiming it—that is, by placing or offering to place the party relying upon the acts of the agents of the town in the same position which he would have occupied but for his reliance upon their validity. These views dispose of the case and render it unnecessary to consider the other points made by the appellants. The judgment of the court below must therefore be reversed, and that court directed to dismiss the suit; and it is so ordered.” Upon the filing of the *remittitur* in the district court, that court, in accordance with the directions of the supreme court, entered a judgment “that the judgment heretofore entered herein in favor of the plaintiffs, and against the defendants, be and the same is hereby in all things reversed, and that this action be and the same is hereby dismissed.”

The doctrine of *res judicata*, or estoppel by reason of a former judgment, rests upon the principle that a cause of action which has been once determined upon its merits by a competent tribunal, between parties over whom that tribunal had jurisdiction, cannot afterward be litigated by them in another proceeding, either in the same or a different tribunal, and it is immaterial whether such cause of action is of equitable or of legal cognizance, or whether the judgment was given in a common-law court or was rendered by a court of equity; the effect of a final judgment in either tribunal is the same. But, if the judgment in either tribunal is rendered for a reason or upon a ground not involving the merits of the controversy, no such effect can result. The form of the judgment is immaterial, but unless it appears from the record that it was given upon a consideration of the merits of the controversy, or if it affirmatively appears that the merits were not considered, it is not available as an estoppel. By section 1908, subdivision 2, of the Code of Civil Procedure, the effect of a judgment is conclusive “in respect to the matter directly adjudged,” and by section 1911 “that only is deemed to have been adjudged in a former action which appears upon its face to have been so adjudged, or which was actu-

ally and necessarily included therein or necessary thereto." Certainty is an essential element of every estoppel, and, in the case of a judgment, unless this certainty appear upon the face of the record, the record of the judgment will not constitute an estoppel. When various grounds of defense are set forth in the answer to the complaint, some of which relate merely to the form of the action, or to the manner in which the suit is brought, and the others to the merits, and the judgment is in general terms without indicating the grounds upon which it is based, it cannot be held to preclude the parties from again entering upon an examination of the merits of the controversy. The distinction sometimes attributed to the effect of a judgment in a common-law action from that rendered in a suit in equity is due chiefly to the mode of procedure, since in either case this effect is only that of an estoppel, and the estoppel can extend only to the matter adjudged. In jurisdictions where actions at law and suits in equity were conducted in different tribunals, the forms of procedure peculiar to each were observed by the respective tribunals, and a judgment dismissing a complaint was ordinarily treated as a final judgment on the merits. This distinction arose from the different mode of presenting the cause of action to the court. In a bill in equity the complaint ordinarily set forth the facts out of which the equity arose, corresponding to the evidence presented at the trial of an action at law, and the judgment of the court was invoked upon the sufficiency of these facts to entitle the plaintiff to the relief he asked, while in an action at law the plaintiff made his demand for damages in general terms, leaving the right to their recovery to be determined by the proof which he might make at the trial. A "nonsuit" was not recognized in equity practice, but was peculiar to common-law practice, and was given only at the instance or with the consent of the plaintiff. In equity, however, the dismissal of a bill had in many instances the same effect as a nonsuit, and by section 581 of the Code of Civil Procedure, involuntary nonsuits are allowed in this state, and the two steps in procedure in the trial of a cause are made equivalent to each other. That section declares that in certain instances "an action may be dismissed, or a judgment of nonsuit entered," making the two proceedings equivalent to each other, and without any distinction between

their effect. (*Coit v. Beard*, 33 Barb. 357; *Wheeler v. Ruckman*, 51 N. Y. 391.) In this state there is but one form of civil action, and the rules of procedure are applicable alike to all actions. A judgment of nonsuit may be entered in a suit in equity, or a common-law action may be dismissed, with the like effect in each. The judgment is entitled to no greater consideration from the mere fact that by its terms it is given upon a dismissal of the action at the instance of the court, than if it were merely a judgment of nonsuit at the instance of the plaintiff. Whenever such judgment is relied upon as a bar to another action, or is offered in evidence as an estoppel, it must appear that it necessarily involved a determination of the fact sought to be established by the second action. The dismissal of a bill in equity upon the ground or for the reason that the plaintiff has an adequate remedy at law is not a judgment upon the merits of the controversy, and, if it appear from the record that the dismissal may have been upon that ground, it will not be held that the merits were considered by the court, or that the judgment is a bar to another action. In order that the judgment may be a bar, it must affirmatively appear that it was not made upon this ground. In *Foot v. Gibbs*, 1 Gray, 412, Chief Justice Shaw said: "If a court does not take jurisdiction of a suit in equity, but dismisses the bill because the plaintiff has an adequate remedy at law, or for want of prosecution, or otherwise for some cause not embracing an adjudication on the merits, such dismissal is not a bar." In *Hughes v. United States*, 4 Wall. 232, the supreme court said: "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." In *Smith v. Auld*, 31 Kan. 262, the court had refused to enter upon a consideration of the merits, and had thereupon dismissed the action, and it was held that such dismissal was not a bar to another action, saying, after quoting various authorities to this effect:

"We think it fairly follows from these authorities that the mere fact that the dismissal is not expressed to be without prejudice does not necessarily establish that it was a decision on the merits, and therefore a bar to a subsequent action." In *Foster v. "The Richard Busteed,"* 100 Mass. 409, 1 Am. Rep. 125, the rule is stated as follows: "To be a bar to future proceedings, it must appear that the former judgment necessarily involved the determination of the same fact, to prove or disprove which it is pleaded or introduced in evidence. It is not enough that the question was one of the issues in the former suit. It must also appear to have been precisely determined." And to the suggestion that in equity the dismissal of a bill imported that the dismissal was on its merits, and therefore a bar to future proceedings, the court said: "There is no essential difference between the effect of a decree in equity and of a common-law judgment in this respect. A bill regularly dismissed upon the merits, where the matter has been passed upon and the dismissal is not without prejudice, is a bar to future proceedings either in equity or at law, and under similar circumstances a judgment at law is a bar to future proceedings in equity. But no such effect is attributable to a decree dismissing a bill for want of jurisdiction, failure of prosecution, want of parties, or any other cause not involving the essential merits of the controversy. And where in the answer various matters of defense are set forth, some of which relate only to the maintenance of the suit and others to the merits, and there is a general decree of bill dismissed, from which it does not appear what was the prevailing ground of defense, it is impossible to hold that the decree operates to preclude future proceedings." In *Butchers' etc. Assn. v. Boston*, 137 Mass. 186, the court said: "If a bill is dismissed for some cause not involving an adjudication upon the merits, such as that the plaintiff has an adequate remedy at law, such dismissal is not a bar to a suit at law. If the record does not show for what cause the bill is dismissed, resort may be had to extrinsic evidence to show this." In *Russell v. Place*, 94 U. S. 606, it was said: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must

appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated and upon which the judgment was rendered, the whole subject matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. If, upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence." (See, also, *Baird v. Bardwell*, 60 Miss. 164; *Aiken v. Peck*, 22 Vt. 260; *Lessee v. Truman*, 10 Ohio St. 45; 1 Greenleaf on Evidence, sec. 530; Story's Equity Pleading, sec. 793, and cases cited in note a; 1 Daniell's Chancery Practice, 659, note b; Bigelow on Estoppel, 58.)

Section 581 of the Code of Civil Procedure provides that an action may be dismissed or a judgment of nonsuit entered in several enumerated instances, and in section 582 it is declared: "In every case other than those mentioned in the last section, judgment must be rendered on the merits." It is contended on the part of the defendant that, as it does not appear that the judgment in the case of *Oakland v. Carpentier*, *supra*, was rendered under any of the provisions of section 581, it was of necessity rendered upon the merits. Section 582 is, however, the declaration of a rule of procedure, rather than a principle of law. It is not the fact that every judgment that is not rendered under the provisions of section 581 is rendered upon the merits. Section 430 of the Code of Civil Procedure specifies various grounds upon which a demurrer to the complaint may be made, and if, upon sustaining such demurrer the complaint is not amended, judgment will then be entered in favor of the defendant. If such judgment is entered for want of jurisdiction in the court, or for defect of parties, or for ambiguity in the statement of the cause of action, it would be neither under the provisions of section 581 nor upon the merits." "A judgment upon the merits is one which determines either

upon an issue of law or fact which party is right" (*Rosenthal v. McMann*, 93 Cal. 509), but the merits of the issue presented upon the facts is a matter entirely different from the merits of the issue presented upon the law.

Under the foregoing principles it must be held that the plaintiff is not estopped from maintaining the present action by reason of the judgment dismissing the suit in the action of *Oakland v. Carpentier*, *supra*. The judgment that was finally entered in the district court in that action was the judgment of the supreme court, and was not rendered by reason of any consideration of the merits of the controversy by the district court, and can, therefore, be invoked as an estoppel only as to those matters which were determined by the supreme court and made the basis of its direction to the district court. That court did not purport to make its decision upon a consideration of the merits of the controversy, nor can it be determined from its opinion whether it directed the dismissal upon the ground that the plaintiff had an adequate remedy at law, or upon the ground that its complaint did not state sufficient grounds to entitle it to invoke the particular aid of equity which it sought. The element of certainty, so essential in every estoppel, is wanting. Lord Coke says (Coke on Littleton, 352 b): "Every estoppel must be certain to every intent, and not to be taken by argument or inference"; but only by either inference or argument can it be determined upon what ground that court directed that the suit be dismissed. It did not determine whether the grant to Carpentier was valid or void; but we have the right to assume that, if it had been required to make a decision thereon, it would have decided in accordance with the conclusion reached by us in the former part of this opinion, that the act of May 4, 1852, gave to the town of Oakland no authority to make the grant to Carpentier.

3. February 19, 1880, the plaintiff herein commenced an action in the superior court for the county of Alameda against the defendant herein and others to quiet its title to the lands involved in this action, and to obtain a judgment that it held the said lands as successor of the state of California by a good and sufficient title in trust for the use and benefit of the public. Issues were joined therein by the several defendants, and, in

addition thereto, the defendant herein filed a cross-complaint against the plaintiff alleging ownership of a portion of the lands, and asking a judgment quieting its title thereto. No answer to this cross-complaint was filed by the plaintiff. While the action was pending the city council of Oakland, January 12, 1882, adopted an ordinance entitled "An ordinance to prevent further litigation concerning the Oakland waterfront," by which its attorneys were directed to discontinue the said action as to all the defendants except the Oakland Water Front Company, and also "to file a stipulation in said action that the Oakland Water Front Company have a final judgment and decree quieting its title to the land described in its cross-complaint, but without damages or costs." Thereafter, February 7, 1882, there was filed in said action a stipulation signed by the respective attorneys as follows, viz: "It is hereby stipulated that this action be dismissed as to all the defendants except the Oakland Water Front Company, and it is further stipulated that the Oakland Water Front Company have a final judgment against plaintiff quieting its title to the land described in its cross-bill or complaint, without damages or costs," and on the same day a decree in said action was entered by the court in the following terms: "This cause coming on to be heard upon the cross-complaint of the defendant, the Oakland Water Front Company, and the stipulation of the parties on file herein consenting to this decree; now, therefore, it is ordered, adjudged, and decreed that said defendant, the Oakland Water Front Company, is the owner of the lands and premises herein"; and quieting its title thereto as against the plaintiff herein. The defendant has pleaded this judgment in bar of the plaintiff's right to maintain the present action.

A judgment rendered by consent becomes *res adjudicata* between the parties thereto, and, if the parties were competent to consent to such judgment, may be pleaded in bar of another action between them, with the same effect as if rendered after resistance and a litigation of the merits of the controversy. A judgment so rendered cannot, however, be treated as *res adjudicata* unless the parties thereto had the capacity to make the agreement which they have consented shall pass into judgment. The parties to a controversy may make an agreement with refer-

ence to their respective rights and obligations in any transaction as readily after an action has been brought for the judicial determination of those rights as without such action, and may have their agreement made a matter of judicial record, and such record of their agreement will have the same effect upon them as the record of a judgment given upon a trial by the court. In such a case, however, the record is not a judgment of the court upon a consideration of the merits of the controversy, but is only a judicial declaration that the parties have made such an agreement, and the court, in its judgment upon such consent, merely exercises a ministerial or administrative function in recording what has been agreed to between the parties.

In *Texas etc. Ry. Co. v. Southern Pac. Co.*, 137 U. S. 48, certain decrees, entered by consent of the parties, were invoked as a bar in another action between them, but the court said: "The decrees were entered by consent, and in accordance with the agreement, the court merely exercising an administrative function in recording what had been agreed to between the parties, and it was open to the supreme court of Louisiana to determine upon general principles of law that the validity of article VI was not in controversy or passed upon in the causes in which the decrees were rendered." The principle was stated by Lord Romilly in *Jenkins v. Robertson*, L. R. 1 Sc. & Div. App. Cas. 117: "*Res judicata* by its very words means a matter upon which the court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced a decision accordingly; but when an action of declarator is brought and a verdict is obtained by the pursuers, which is set aside, and an arrangement afterward takes place by which, in consideration of the payment of a sum of money, an interlocutor is pronounced for the defenders, and the court simply registers that interlocutor, without expressing any judicial opinion on the subject, I am of opinion that it is contrary to all principle to consider that such a transaction can be treated really as *res judicata*. . . . In my opinion *res judicata* signifies that the court has, after argument and consideration, come to a decision on a contested matter; here the court exercised no judicial function upon the subject. It has merely exercised an administrative function by recording the interlocutor which had been agreed to between the parties." In *San*

Francisco etc. v. Le Roy, 138 U. S. 656, where an action had been brought by one Shaw against the city and county of San Francisco, in the state court, to quiet his title to certain pueblo lands, and the city had appeared by its attorney and filed a disclaimer and a consent to a judgment in favor of the plaintiff, the court said in reference thereto: "Whatever authority the attorney of the city and county may have had to conduct its ordinary litigation, he had none to relinquish rights reserved for the benefit of the public by the Van Ness ordinance." In *Kelley v. Milan*, 127 U. S. 139, in an action to enforce certain municipal bonds, the plaintiff relied upon a decree in chancery confirming their validity, which it was shown had been entered by consent of the parties upon an agreement to that effect signed by the mayor. Upon this it was said by the court: "This was no adjudication by the court of the validity of the bonds on the submission to it as a judicial tribunal of the question of such validity. The declaration of the validity of the bonds contained in the decree was made solely in pursuance of the consent to that effect contained in the agreement signed by the mayor of the town and the officer of the railroad company. The decree of the court was based solely upon the declaration of the mayor in the agreement that the bonds were valid. The adjudication in the decree cannot, under the circumstances, be set up as a judicial determination of the validity of the bonds. This was not the case of a submission to the court of a question for its decision on the merits, but it was a consent in advance to a particular decision by a person who had no right to bind the town by such a consent, because it gave life to invalid bonds, and the authorities of the town had no more power to do so than they had to issue the bonds originally." In *Lawrence Mfg. Co. v. Janesville etc. Mills*, 138 U. S. 552, the same principle was declared, the court saying: "The prior decree was the consequence of the consent, and not of the judgment of the court, and, this being so, the court had the right to decline to treat it as *res adjudicata*." See, also, *Gay v. Parpart*, 106 U. S. 698, *Wadhams v. Gay*, 73 Ill. 415, *Branham v. San Jose*, 24 Cal. 604, where the court said: "It is obvious that the ayuntamiento, being merely the agents of the pueblo, acting under defined and expressly limited powers, could not bind the property held in trust by them for community purposes by any act not

strictly within those powers, either by way of contract or by the mere sufferance of judicial proceedings."

Under the foregoing authorities it is manifest that the judgment relied on is not available to the defendant as a muniment of title to the lands in question, or as an estoppel against the plaintiff in the assertion of its claim to the said lands. The plaintiff's consent to the judgment gave to the defendant no greater right than would its simple grant of the lands, for the reason that by reason of the trust under which they were held it was precluded from making such disposition, as we have above seen, either by a direct grant or by consenting to a judicial decision.

4. No greater effect is to be attributed to the several confirmatory ordinances subsequently adopted by the town of Oakland, or by the city of Oakland, than was created by the original ordinance. The same inability or infirmity in the town to transfer the land, or to make the grant, by the original ordinance, was inherent at the time of the adoption of the confirmatory ordinances, and continued in its successor, the plaintiff herein, and equally precluded any confirmatory ordinance which might be adopted from having a greater effect than did the ordinance which was originally adopted. The ordinances adopted by the city April 1 and April 2, 1868, by which it purported to release and abandon to Carpentier and his assigns all its claims in and to the franchises and property described in the former ordinances, were equally without the power of the city, so far as it was attempted thereby to part with its right to said land, or to confirm the preceding ordinances. The condition of the release named in the first of said ordinances, and which in the second is recited to have been performed, was the transfer of the land and franchises by Carpentier to the defendant herein, but, as such transfer was in pursuance of an agreement therefor previously entered into between them, to become effective upon the adoption of said ordinance, and, as the plaintiff herein was neither a party to such agreement, nor received any consideration or benefit by reason of the agreement or its subsequent execution, there was no equity created thereby in favor of the defendant and against the plaintiff, by which the plaintiff is precluded from asserting its want of power to adopt the ordinance.

The act of the legislature of March 31, 1868 (Stats. 1868, p. 222), under which the city council purported to adopt the said ordinances, cannot be construed as giving to the city a power to alienate property by way of compromise which had never been within its power to alienate, and whose alienation it was without the power of the legislature to authorize.

It is unnecessary to show that the rights of the city to the land could not be divested by a sale under execution upon a judgment recovered against it. Whatever liabilities the city might incur, as well as whatever obligations might be held against it, could be discharged only from its own property, and not from that which it held in trust for the public. As the land was public property, and held in trust by the city for the public, no right thereto could be created by virtue of any assessment or payment for taxes levied thereon.

5. The court found that certain parcels of land within the tract described in the complaint "have been filled in with earth, whereby said pieces have been raised above the level of ordinary high tide," and "that by reason of said several pieces of land being filled in and reclaimed from the tide, as appearing in these findings, plaintiff has lost, and the defendant has acquired, the title to each of said pieces so filled, and is the proprietary owner in fee of the same." These parcels are particularly described in the findings, and are excepted from the tract of land of which the plaintiff is adjudged to be the owner, and the defendant's title to said parcels is adjudged to be good and valid. The court also found that the defendant had the right to occupy and use, in a manner not inconsistent with the ordinary uses and purposes of navigation and commerce, two wharves described in the judgment which had been constructed upon the land of which the title was found to be in the plaintiff, until compensation be made to it for their value; and also found that the plaintiff is not the owner of that part of the lands described in the complaint which lie southerly from the present southerly boundary line of the city of Oakland. In accordance with these findings judgment was therefore rendered against the prayer of the plaintiff. From these portions of the judgment the plaintiff has appealed.

The parcels of the lands described in the complaint which have been raised above the level of ordinary high tide by filling

in with earth have thereby ceased to be capable of common use by the public for the purposes of commerce and navigation, and have therefore ceased to be subject to the trust under which navigable waters and the lands covered thereby are held by the state, and consequently the plaintiff, as the agent of the state in the discharge of that trust, has no further interest in the lands so reclaimed, or function to perform in reference thereto. If the lands have ceased to be held by the state in its sovereign capacity under the above trust, individuals may acquire the title of the state thereto by the same means as they may the title to any other lands held by the state merely in its proprietary right.

The wharves for which the plaintiff is, by the judgment, required to make compensation before the defendant shall be required to surrender possession, were constructed many years before the commencement of this action and while the defendant or its predecessor was in the possession of the lands under the ostensible grant of the plaintiff's predecessor. These wharves are instruments for carrying out the purposes of the trust under which the lands were held by the state, and their construction was within the purpose for which the state placed the lands under the control of the plaintiff. As they were constructed by the ostensible permission of the plaintiff or its predecessors, it would be inequitable for the plaintiff, having stood by and suffered their construction without making any objection thereto, to deprive the defendant thereof without making it compensation therefor.

In the act of 1852 incorporating the town of Oakland, its boundaries extended to the southerly line of the San Antonio creek; "thence down the southerly line of said creek or slough to its mouth in the bay; thence to ship channel." The act of 1854 incorporating the city of Oakland provided that "the boundaries of said city shall be the same as the boundaries of the present town of Oakland," and by section 12 of the act it succeeded to all the legal and equitable rights of the town of Oakland. The act of 1862 reincorporating the city declared: "The boundaries of said city shall be the same as are the boundaries of the late town of Oakland, which are more particularly defined and described as follows, to wit: "To the easterly or southeasterly line of that branch of the San Antonio slough, or estuary, over

which crosses the bridge from Oakland to Clinton; thence along the eastern and southern highest tide line of said slough and of the estuary of San Antonio, following all the meanderings thereof to the mouth of said estuary in the bay of San Francisco; thence southwesterly to ship channel." In the charter adopted by the citizens of Oakland, and approved by the legislature in 1889, the boundaries of the city, after reaching the intersection of Park avenue with the Encinal line of the town of Alameda, is "thence westerly following the center of the slough and the center of the estuary of San Antonio to ship channel in the bay of San Francisco."

As the plaintiff's claim to the lands in question is only by virtue of being a public corporation and governmental agency of the state, its right to the control of any of said lands must be limited to those of which it is the governmental agent of the state. The plaintiff's claim to the lands as successor to the town of Oakland must be limited to such as the state released to the town by the act of 1852, since that is the only statute by which the state has delegated the control of these lands. Although the boundaries of the city of Oakland were extended by the act of 1862, the state did not confer upon the city the control of the tide lands other than had been conferred by the act of 1852. The state had at all times the right to change the boundaries of the municipality, and whenever such change was made it ceased to be the governmental agent of the state for the management and control of the state's interest in any lands outside of its charter limits. It was not necessary that the state should expressly repeal or revoke the right or power of control originally given by it to the town of Oakland. The exclusion of any portion of the lands from the territory of the plaintiff would remove its control thereof as effectually as would a direct repeal of the power given in the act by which their management was originally intrusted to it; and the change in the boundaries of the city adopted by the citizens in 1889 was as effective for this purpose as if made by the legislature itself. It follows that, as the plaintiff's claim is limited to lands within its charter limits, the court was not authorized to enter a judgment in the present action affecting the title to lands outside of those limits.

It is proper to observe that the city of Oakland and the Oakland Water Front Company are the only parties to this action, and that the judgment herein is determinative of the rights of only these parties. Whatever rights to the land described in the complaint, or to any part thereof, the people of the state or any other person may have will not be affected hereby. Neither are we called upon to determine the boundaries of the land granted to the town of Oakland by the act of May 4, 1852, or to determine the location of the line of "ship channel," or the meaning of the term. There is no issue presented in the pleadings, nor was there any controversy at the trial, upon the location of "ship channel," and the court did not, either in its findings or in its judgment, assume to fix its location, but merely determined that the title of the plaintiff extended "to ship channel in the bay of San Francisco; thence northwardly and westwardly along ship channel to its intersection with the projection northwestwardly of the northern boundary of the city of Oakland." The plaintiff seeks to quiet its title to all the land described in the legislative grant to the town of Oakland by the act of May 4, 1852, viz: "The lands lying between high tide and ship channel," and bases its title solely upon that grant, while the title to the land which is claimed by the defendant is derived under the same legislative grant, through the conveyance to Carpentier. Whatever may be the proper location of that line, it is equally the limit of the claim by each of the parties hereto. The location of "ship channel" is therefore not only immaterial under the views expressed in the foregoing opinion, but as it was not an issue between the parties it did not require determination by the superior court, and does not call for an examination by this court.

The judgment and order denying a new trial should be affirmed.

Henshaw, J., concurred in the foregoing opinion of Mr. Justice Harrison.

Rehearing denied.

[No. 15729. In Bank.—September 13, 1897.]

THE PEOPLE, Appellant, v. OAKLAND WATER FRONT
COMPANY et al., Respondents.

ACTION TO QUIET TITLE OF STATE—LANDS IN HARBOR OF OAKLAND AND ALAMEDA—AUTHORITY OF ATTORNEY GENERAL.—The attorney general has authority to institute an action in any case in which the rights and interests of the people of the state are directly involved, without any new authority expressly conferred by law; and may institute an action to quiet the title of the state to lands in navigable waters constituting the harbor of the cities of Oakland and Alameda, and to determine adverse claims made thereto.

ID.—MODE OF TESTING AUTHORITY OF ATTORNEY GENERAL—DEMURRER—WANT OF CAPACITY TO SUE—MOTION TO DISMISS.—The question as to the authority of the attorney general to sue in the name of the state is not properly presented by a demurrer for want of capacity in the plaintiff to sue; but the proper practice is to move to dismiss the information on the ground, among others, that the attorney general had no authority or power to institute or prosecute the proceeding in the name of the state.

ID.—JURISDICTIONAL QUESTION—JUDICIAL NOTICE.—The authority of the attorney general to sue in the name of the state presents a jurisdictional question; and the court is bound to take judicial notice, whether he has or has not authority to institute the proceeding under the constitution and laws of the state.

ID.—DEMURRER TO COMPLAINT OF STATE—JUDICIAL NOTICE—GRANT OF TIDE LANDS TO OAKLAND—CHARTER AND AMENDMENTS—DESCRIPTION INCLUSIVE OF OTHER LANDS.—In passing upon a general demurrer to a complaint by the state to quiet its alleged title to lands in the harbor of the cities of Oakland and Alameda, lying between high tide and ship channel, to a depth of twenty-four feet at ordinary low tide, in the bay of San Francisco and San Antonio creek, and to determine adverse claims made thereto by the city of Oakland and other defendants, and to restrain and abate obstructions therein, it is proper for the court to take judicial notice of the grant by the state to the town of Oakland of lands within its corporate limits lying between high tide and ship channel, made by the act of May 4, 1852, incorporating the town, and also of the act of March 25, 1854, incorporating the city as successor of the town, and of other acts amendatory of and supplemental to the charter of Oakland; but inasmuch as the description in the complaint is not coincident with a proper construction of the grant to the town, but appears to be inclusive of lands in navigable waters beyond the line of low tide, and may include lands lying in the eastern basin of the estuary, outside of the corporate limits of the town, and the complaint states a cause of action in favor of the state, the demurrer thereto is improperly sustained.

- ID.—CONTRACTION OF SOUTHERN BOUNDARY OF OAKLAND—RENUNCIATION OF PART OF GRANT—RESUMPTION OF CONTROL BY STATE.**—The state having, by recent legislation, contracted the southern boundary of Oakland so as to exclude from its limits the southern half of the estuary, such exclusion amounts to a renunciation on the part of the city, and resumption by the state of the control of so much of the grant as may have been covered by the excluded portion of the city.
- ID.—CONDITIONS SUBSEQUENT—FORFEITURE OF GRANT—PLEADING.**—The question whether the grant was forfeited to the state by breach of conditions subsequent cannot be considered, where the allegations of the complaint of the state are not so framed as to support an action to enforce such a forfeiture.
- ID.—INJUNCTION—OBSTRUCTION OF NAVIGATION BY GRANTEES OF STATE—PUBLIC NUISANCE—INDEPENDENT ACTS OF SEVERAL DEFENDANTS—MISJOINDER—SEVERAL ACTIONS NECESSARY.**—A grant by the state of the soil under navigable waters carries with it no right to obstruct navigation, and the state may enjoin its grantees or their successors from erecting or maintaining structures which will impair or interfere with the exercise of the public right of navigation, so as to constitute a public nuisance; but where each of several defendants is acting independently of the others in the erection and maintenance of separate structures obstructing navigation, it is a misjoinder of causes of action and of parties defendant to join them in one action to abate nuisances, but each must be sued in a separate action.

APPEAL from a judgment of the Superior Court of Alameda County. F. W. Henshaw, Judge.

The facts are stated in the opinion of the court.

W. H. H. Hart, Attorney General, and Aylett R. Cotton, for Appellant.

The complaint in this case is similar to the information or bill in equity in the Chicago case, and states a cause of action. (*Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387.) The attorney general had authority to institute this action. (*People v. Stratton*, 25 Cal. 242; *People v. Gold Run Ditch etc. Co.*, 66 Cal. 138; 56 Am. Rep. 80; *County of Yolo v. Sacramento*, 36 Cal. 193; High on Injunctions, secs. 761, 1303.) Judicial notice could not properly be taken upon demurrer of any grant made to Oakland by the act of May 4, 1852, judicial notice being merely a species of evidence where there is a trial upon an issue of fact. (Code Civ. Proc., secs. 590, 1823, 1827.) Any qualified rights in navigable water held under grant from the state

are subject to the right of the state to protect navigation; and the state cannot part with rights which are held in trust for the public. (Const., art. XV, secs. 1, 2; *Heckman v. Swett*, 99 Cal. 309, 310; *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 452-56; Gould on Waters, sec. 32.) There is no misjoinder of causes of action. It is the great object of courts of equity to put an end to litigation, and to settle the rights of all persons interested in or affected by the subject matter of the controversy. (*Reynolds v. Lincoln*, 71 Cal. 187.) Different modes of relief do not make different causes of action. (Bliss on Code Pleading, sec. 114.) It was not necessary that the complaint should define what portion of the lands described in the complaint any defendant claims nor the interest that he claims. (*Castro v. Barry*, 79 Cal. 443.) The state alone has the right to complain of any trespass upon its rights. (*San Pedro v. Southern Pac. R. R. Co.*, 101 Cal. 337.)

A. A. Moore, J. C. Martin, William F. Herrin, and H. S. Brown, for Oakland Water Front Company, Railroad Companies, and Pacific Improvement Company, Respondents.

The court properly took judicial notice of the statutes taking title out of the state. The court may, upon demurrer, take judicial notice of facts not averred, which are established by law. (*Cole v. Segraves*, 88 Cal. 103; *Fackler v. Wright*, 86 Cal. 210; *Rogers v. Cady*, 104 Cal. 288; 43 Am. St. Rep. 100; *Chapman v. Wilber*, 6 Hill, 475; *De Baker v. Railway Co.*, 106 Cal. 257; 46 Am. St. Rep. 237.) The state cannot complain of improvements made within the limits of the grant from the state to the city of Oakland. (*Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 381-3.)

James A. Johnson, William R. Davis, W. Lair Hill, E. J. Pringle, and H. A. Powell, for City of Oakland, Respondent.

The legislature had the right to make the cession to the town of Oakland made by the incorporating act of May 4, 1852. (*San Pedro v. Southern Pac. R. R. Co.*, 101 Cal. 337.) The city of Oakland is the successor of the town under the act of March 25, 1854. (*Oakland v. Carpentier*, 13 Cal. 540; 21 Cal. 642; *San Francisco etc. R. R. Co. v. Oakland*, 43 Cal. 504, 505.) The state

has recognized the right of the city of Oakland to control the harbor and wharves erected therein. (Stats. 1854, p. 183; Stats. 1860, p. 67; Stats. 1861, p. 384; Stats. 1862, pp. 337-55; Stats. 1867-68, p. 501; Stats. 1870, p. 693; Stats. 1875-76, p. 567; Freeholder Charter, Stats. 1889.) A fact of which the court takes judicial notice is as much part of the pleadings as if it had been averred. (*Branham v. Mayor etc.*, 24 Cal. 602.) The courts take judicial notice of whatever is established by law. (Code Civ. Proc., sec. 1875; *People v. Smith*, 1 Cal. 9; *Irwin v. Phillips*, 5 Cal. 140; 63 Am. Dec. 113; *Ede v. Johnson*, 15 Cal. 53; *Payne etc. v. Treadwell*, 16 Cal. 220; *People v. Potter*, 35 Cal. 110; *People v. Hagar*, 52 Cal. 188.)

William & George Leviston, for Edson F. Adams, John C. Adams, Hannah J. Adams, Julia P. A. Prather, California Development Company, Horace W. Carpentier, and E. C. Sessions, Respondents.

The attorney general was not the proper officer to begin this action. (Pol. Code, secs. 443, subd. 16, 470.) There is a misjoinder of parties defendant and of causes of action. (Code Civ. Proc., sec. 427.) The court properly took judicial notice that the state had parted with its interest in the subject matter of the action. (Code Civ. Proc., sec. 1875; *Cole v. Segraves*, 88 Cal. 105; *Ex parte Kearney*, 55 Cal. 221; *People v. Hagar*, 52 Cal. 188; *Whiting v. Townsend*, 57 Cal. 515; *Faskler v. Wright*, 86 Cal. 210.)

George M. Shaw, for T. W. Badger, Respondent.

Courts take judicial notice at any stage of an action or proceeding, without averment or proof. (Code Civ. Proc., sec. 1875; 12 Am. & Eng. Ency. of Law, 151, 159, note 2; Bliss on Code Pleading, sec. 177; Stephen's Pleading, 345, 353, 354; *Wilhoit v. Cunningham*, 87 Cal. 458; *Kraner v. Halsey*, 82 Cal. 210; *Brown v. Anderson*, 77 Cal. 236; *Belcher etc. Co. v. Deferrari*, 62 Cal. 162; *Staude v. Election Commrs.*, 61 Cal. 313; *People v. Hagar*, 52 Cal. 188; *Talbert v. Hopper*, 42 Cal. 397; *People v. Robinson*, 17 Cal. 371.) The state had the authority to make the grant to the city of Oakland. (*Shively v. Bowlby*, 152 U. S. 1; *Taylor v. Underhill*, 40 Cal. 473; *Kimball v. Macpherson*, 46 Cal. 104;

Upham v. Hoskings, 62 Cal. 250; *Northern Ry. Co. v. Jordan*, 87 Cal. 23; *Weber v. Harbor Commrs.*, 18 Wall. 65, 66.)

Mich. Mullany, for H. N. Dalton, Respondent.

The legislative grant to the city of Oakland was for a public use, and was valid; and the authority of the city as a public trustee has never been revoked by the legislature. (*Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387; *Pollard v. Hagan*, 3 How. 212; *Shively v. Bowlby*, 152 U. S. 1; *San Francisco v. Itsell*, 80 Cal. 59; *People v. Holladay*, 93 Cal. 243; 27 Am. St. Rep. 186.)

BEATTY, C. J.—This is an action to determine adverse claims to real property, and for other incidental relief, instituted by the attorney general in the name and on behalf of the people of the state. All the defendants who are contesting the claims of the state demurred to the first amended complaint upon the general ground that it failed to state a cause of action, and a few of them demurred specially upon various other grounds. These demurrers were sustained by the superior court upon the sole ground, as appears by the terms of its order, that the said amended complaint did not state facts sufficient to constitute a cause of action. And the judge of said court being of the opinion that the defect could not be cured by amendment, leave to file a second amended complaint was denied, and judgment ordered to be entered for defendants. From the judgment entered in pursuance of said order this appeal is prosecuted.

Such being the case, the principal questions to be determined relate to the right of the plaintiff to any relief upon the facts admitted by the demurrer. There is, however, a preliminary question, jurisdictional in its nature, which must first be disposed of.

It is contended on behalf of several of the defendants that the attorney general had no authority to institute the action, and that the judgment of the superior court should be affirmed for that reason alone. No motion to dismiss the action upon this ground was made in the superior court, but it is contended that the objection is raised by those of the demurrers which specify, among other grounds, want of capacity in the plaintiff to sue. It seems very clear that this objection does not come under that

head, and doubtful if it comes within any of the grounds of demurrer mentioned in the Code of Civil Procedure. (Code Civ. Proc., sec. 430.) The proper practice would seem to be that followed in *People v. Stratton*, 25 Cal. 242, where the defendant moved in the district court to dismiss the information upon the ground, among others, that the attorney general had no authority or power to institute or prosecute the proceedings in the name or on behalf of the people of the state.

But notwithstanding the failure of the defendants to raise this objection in the regular way, we consider it necessary to decide it for the reason that it is, as above stated, jurisdictional in its nature. Whatever authority the attorney general has to institute such a proceeding must be derived from the constitution and laws of the state, and if he has no authority we are bound to take judicial notice of the fact. Such seems to have been the view of our predecessors in the case of *People v. Stratton*, *supra*, for although they finally decided that the information there in question was fatally defective for want of facts—a conclusion which would necessarily have resulted in an affirmance of the judgment of the district court—they nevertheless deemed it necessary to determine in the first place whether the district court had erred in dismissing the information upon the ground that the attorney general had no authority to file it. They felt obliged, that is to say, before determining the merits of the controversy, to ascertain whether it was properly before them for decision.

And so here, the matter having been brought to our attention, however irregularly, we feel obliged to dispose of the objection *in limine*. Precisely the same question that confronts us was necessarily involved in *People v. Stratton*, *supra*. The provisions of the constitution and laws defining the nature of the office and prescribing the duties of the attorney general were substantially the same then as now. It was conceded by the supreme court that the solution of the question as to his authority to file an information for the purpose of annulling a state patent was difficult; but they concluded that by analogy to the powers exercised by the same officer in England and in most, if not all, the states of the American Union, he could do so in a case directly involving the rights and interests of the state. Ever since the date of

that decision (1864), under the present constitution as well as under the old one, the attorney general has continued to file informations in the name of and on behalf of the people of the state in cases involving directly their rights and interests, and that without any new authority expressly conferred by law. In one or two of these cases his authority to institute the proceedings has been directly assailed, and expressly affirmed by the court. (*People v. Gold Run etc. Co.*, 66 Cal. 138; 56 Am. Rep. 80; *People v. Beaudry*, 91 Cal. 220.) In numerous other cases cited in *People v. Beaudry*, *supra*, his authority was unchallenged. In view of these decisions and this long course of practice, we think it is now too late to question the authority of the attorney general to institute an action in a case in which the rights and interests of the people of the state are directly involved, as they undoubtedly are in the case stated in this bill.

Having thus reached the conclusion that the matters in controversy are properly before us for decision, it becomes necessary to state with some particularity what the case is, as made by the amended complaint.

After the usual and formal allegations as to the names and descriptions of the numerous persons, natural and corporate, who are made defendants in the action, the plaintiff proceeds to allege the admission of California as one of the states of the Union, its boundaries as defined by the constitution and act of admission, the fact that said boundaries embrace the bay of San Francisco, and all its arms, including the creek or estuary of San Antonio, and "that upon the admission of said state into the Union, as above stated, it acquired, and now continues to retain, as well the jurisdiction over as the soil of the beds of the said bay, including said San Antonio creek, and the right, title, power, and authority in, to, and over the same, absolutely and completely, subject only to the right of the United States to supervision over the navigable waters of said bay, and the arms of said bay, so far as may be necessary in exercising its right to regulate commerce with foreign nations and among the several states; that thus possessing the sovereign power over, and proprietorship of, the said bay of San Francisco and said San Antonio creek, and the beds thereof, said state has the right to protect and defend the same from encroachment, and to sue for relief in respect of

any encroachment or infringement of its sovereign or proprietary rights therein; that the lands hereinafter described, and which are situated in the county of Alameda and state of California, are portions of the beds of said bay of San Francisco, and of said San Antonio creek; and all of said lands, at the time said state was thus admitted into the Union, were situated and lying, and continue to be situated and lying, below the line of ordinary high tide, said lands being described as follows, to wit: All the land within the limits and boundaries of the said city of Oakland and city of Alameda, and lying and situated between high tide of the waters of said bay of San Francisco and of said San Antonio creek and ship channel in said bay of San Francisco and in said San Antonio creek as it existed on September 9, 1850, and more particularly described as follows, to wit." The description which follows is of a boundary traced partly along the exterior lines of certain land patents from the United States to Domingo, Vicente, and Antonio Peralta, where said lines meander the shores of the bay of San Francisco and the estuary of San Antonio, partly along what is called ship channel in the bay of San Francisco, and partly along the northeastern boundary of the city of Oakland, as defined in the original act of incorporation passed in 1854. It would not be easy, and is, perhaps, impossible, to determine from the face of the complaint precisely what territory this description embraces, although it is aided to some extent by what follows, to the effect that "said lands are situated in that part of said bay of San Francisco which, together with said San Antonio creek, constitutes the harbor of the city of Oakland and the city of Alameda, in said county of Alameda; that said city of Oakland is situated upon that part of said bay which includes said lands and upon said San Antonio creek; that said lands, at the time said state was thus admitted into the Union, extended and now continue to extend (except so far as portions of said lands have been filled, the extent of which is to plaintiff unknown) to a considerable distance under the navigable waters of said bay and of said San Antonio creek and to ship channel in said navigable waters, and to a depth in said navigable waters at ordinary low tide of, to wit, twenty-four feet; that a large portion of said lands are, and always have been, constantly covered by said waters, and that the residue of said lands are, and at all times have been, covered

by said navigable waters at ordinary high tide, except so far as they have been filled." The remaining allegations of the complaint are not material to the principal point to be decided, but it may be useful to epitomize them briefly in order to indicate the general features of the case and the nature of the relief which the plaintiff is seeking.

It is alleged that San Antonio creek is and always has been navigable, that the federal government has expended, and continues to expend, large sums of money in its improvement, and in the improvement of the bay as a harbor for the populous and growing cities of Oakland and Alameda, which front upon the tidal and navigable waters of said bay and estuary, and that the lands described in the complaint embrace all the waterfront of said cities, at which vessels can land, and all that can be made available for that purpose, and all the lands and shores upon which landings, wharves, docks, or piers, or other structures for landing, loading, or unloading of vessels at said cities, can be constructed or maintained; "that a large portion of said waterfront and of said lands is now required for the erection and maintenance of wharves, docks, and piers and other structures for the use of vessels landing at said cities, in receiving and discharging cargoes, and the necessity for the use of additional portions of said shores and lands, for the purposes aforesaid, will be constantly on the increase until the whole thereof will be required for such use.

"That other large portions of said lands and shores are and will be required for the termini of railroads of companies now and hereafter seeking to enter said city of Oakland and said city of Alameda, and to obtain access to said navigable waters for the purpose of connecting with vessels navigating said waters, and bringing car and ship together."

Other allegations follow showing the relative situation of the city of San Francisco to the bay and estuary, the size and importance of the harbor for purposes of domestic and foreign commerce, and the fact that all commodities transported between San Francisco and the eastern states, and other parts of the state of California, by land carriage must pass over the lands and water front in controversy.

It is next alleged that the defendants claim estates and interests and absolute title in and to all the aforesaid land and waterfront adverse to the plaintiff, and claim adversely to the plaintiff absolute control of the same, and the right to control and prevent the landing of vessels at the waterfront of Oakland and Alameda, and the right to prevent the construction of wharves, docks, piers, etc; that under said claim the defendants have driven piles along the waterfront below the line of low tide, and have erected various structures upon the waterfront which obstruct the public right of navigation, and constitute public nuisances and purprestures; that on the wharves and piers which they have unlawfully erected many of the defendants have charged and received pay for the privilege of using them; that the Oakland Water Front Company, in conjunction with other of the defendants, has actually proceeded to fence in a portion of the open harbor in the bay, by driving lines of piles in the deep water for the purpose of securing a monopoly of the enclosed space, etc. Wherefore judgment is prayed that the defendants may be required to set forth the nature of their several claims, and that they be adjudged invalid; that the title of the state and its right to control and develop said harbor and waterfront be established; that the structures erected by defendants thereon be ordered removed, or declared subject to the control of the state, and that the defendants and each of them be enjoined from having any control over any part or portion of said waterfront including the wharves and buildings thereon, and from making any charges for toll, dockage, or wharfage for the use thereof. There is also a prayer for a temporary and permanent injunction against the Oakland Water Front Company, and the defendants acting in conjunction therewith, restraining them from driving piles or otherwise inclosing or obstructing the open waterfront.

That this complaint, considered by itself, states a cause of action is a proposition that does not admit of doubt, and the ruling of the superior court sustaining the general demurrer was not rested upon the ground that its allegations were in themselves insufficient to entitle the plaintiff to any relief. But it was held that in dealing with the general demurrer the court not only could, but was bound to, take judicial notice of certain public

statutes of the state of California, the provisions of which were held to be so inconsistent with essential allegations of the complaint as to render it legally impossible to treat them as admitted or true.

The particular statutes which the court considered in this connection were: 1. The act of May 4, 1852, entitled "An act to incorporate the town of Oakland, and to provide for the construction of wharves thereat" (Stats. 1852, p. 180); 2. The act of March 25, 1854, entitled "An act to incorporate the city of Oakland" (Stats. 1854, p. 183); and 3. Various subsequent acts amending and supplementing the act last cited.

By the first of these acts the boundaries of the town of Oakland were defined, and it was incorporated subject to the provisions of a general act relating to town corporations previously passed. Some special powers were also conferred upon the municipal authorities, "and with a view to facilitate the construction of wharves and other improvements the lands lying within the limits aforesaid [the corporate boundaries], between high tide and ship channel," were "granted and released to said town."

By the second of said acts the town of Oakland, without alteration of its boundaries, was reincorporated as the city of Oakland, with enlarged municipal powers and privileges, and all the rights and privileges of the former town devolved upon the new city. By the subsequent acts the charter of the city was amended in various particulars, and its boundaries altered and enlarged.

The superior court, taking cognizance of these acts, held that the original grant to the town of Oakland embraced the identical land described in the complaint, and all of it; that the title thereto had never reverted in the state, and could not by any legal possibility have done so, in the absence of a law revoking the gift, and, consequently, that the allegation in the complaint of ownership by the state could not be true, and could not be treated as true in ruling upon the demurrer.

It is contended on the part of the appellant that the superior court erred in holding that it could look beyond the face of the complaint in ruling upon the demurrer; that the doctrine of judicial notice is only a rule of evidence, and cannot be applied to the construction of a pleading; that a demurrer admits the truth of every fact that is well pleaded, and that a fact may be

well pleaded notwithstanding the existence of a valid law establishing conclusively the direct reverse of the matter alleged.

We do not think that these propositions are sustainable either upon reason or authority. The allegation of a sound conclusion of law is always regarded as superfluous in pleading, and the allegation of an unsound conclusion is entirely disregarded. This is undeniably true with respect to laws establishing general rules of right or obligation, and there is no reason why it should not be held equally true in respect to a law which merely determines the status of a particular thing. Why should a general demurrer to a complaint be overruled and the parties required to proceed to the trial of an issue of fact when the court, looking to a law of which it is bound to take notice, can clearly see that one of the essential allegations of the complaint can never by any legal possibility be proved? What useful or desirable end could be attained by shutting its eyes to the certain event of the litigation and putting the parties to the trouble, delay, and expense of framing and preparing to try issues which can have no influence upon the final result? These questions answer themselves and make it entirely clear that there are no considerations of expediency or convenience to support the contention of appellant. It is also opposed to the authority of more than one decision of this court. The object and purpose of most laws is to establish general rules governing the conduct of those who are subject to the jurisdiction of the state, but there are many laws of a different character—such, for instance, as laws defining county and municipal boundaries or making grants from the public domain. Laws of this class establish facts and the *status* of particular places and things, just as conclusively as laws of the other class establish rules of conduct, and the courts are as much bound to observe and enforce the one as the other at all times and at all stages of any judicial proceeding. A legislative grant from the public domain is not only a grant but is also a law, and if a case is such that a grant being once made the title can never revert in the state except by a legislative revocation of the grant, and there has been no such revocation, the courts of the state must take notice at all times that the grantee or his successor is, and that the state is not, the owner of the thing granted.

In the case of *Cole v. Segraves*, 88 Cal. 104, the jurisdiction of the court depended upon the fact, not directly alleged, that the demanded premises were situated in Lassen county, but it was alleged that they were situated in the town of Susanville, and the complaint was held sufficient because the court could take judicial notice of the fact that Susanville was the county seat of Lassen county.

In *Faekler v. Wright*, 86 Cal. 210, the question was again one of jurisdiction arising on the pleadings, and it was held, in sustaining the jurisdiction, that the court must take judicial notice that land described by reference to the public surveys was in the county where the action to foreclose a mortgage was commenced.

In *Rogers v. Cady*, 104 Cal. 290, 43 Am. St. Rep. 100, the same rule was applied in the construction of a judgment. In *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237, the court took judicial notice of the same class of facts in order to supply the omission of any direct allegation of essential matters.

The highest courts of other states have followed the same rule in the cases cited in the briefs of counsel, to which we deem it unnecessary to make more particular reference.

Possibly it may be objected that the decisions above cited are inapplicable to the present case because the court has here ignored a fact alleged, while in the other instances all that was done was to supply a fact not alleged. But clearly the same principle governs both cases, and an exact precedent for the course here pursued is found in the case of *Mullen v. State*, 114 Cal. 581. (And see, also, *Chapman v. Wilber*, 6 Hill, 475.) Our conclusion on this point is that the superior court did not err in holding that it must take judicial notice of the legislative grant to Oakland in ruling upon the demurrers.

But, while we are entirely satisfied that the superior court adopted a correct principle of decision, we think it erred in the application of it. For taking the description of the grant to the town of Oakland contained in the act of 1852, and comparing it with the land described in this complaint, it cannot be seen that the land here claimed by the state is all embraced within the grant to Oakland. The terms of the two descriptions are in

many particulars utterly dissimilar, and where the same terms are employed, they are not always employed in the same sense. The complaint, for instance, in describing the bay front of the tract claimed, uses the term "ship channel" as the equivalent of the line of twenty-four feet depth of water at low tide; whereas the words "ship channel," as used in the act of the legislature to describe the bay front of the town and grant, do not necessarily imply a line conforming to that depth of water at any stage of the tide. The two descriptions cannot, therefore, be laid one upon the other so as to demonstrate an exact coincidence of boundaries, nor can it be made to appear that either tract is entirely contained within the other. On the contrary, it appears from the complaint that the defendants are claiming the submerged lands of the bay front out to a depth of twenty-four feet at low tide, whereas it cannot be legally implied from the term "ship channel," as used in the act of the legislature, that the state has ever made a grant extending to that line. And if this serious discrepancy of boundaries appears on the face of the complaint as to one side of the tract in controversy, it may be that other discrepancies even more serious will be disclosed by the evidence when the issue comes to be tried. In point of fact we know from the evidence in another case which was argued and submitted together with this case (*Oakland v. Oakland Water Front Co.*, ante p. 160) that the description in this complaint embraces the eastern basin of the estuary, sometimes called the Brooklyn basin, and in the same way we know that the legislative grant to Oakland did not include Brooklyn basin. This point, of course, cannot be decided in this case, because the evidence relating to these boundaries is not in this record, and it is only mentioned by way of illustration to show more clearly that the ground upon which the general demurrers were sustained is untenable.

Another point to be noticed in this connection is, that the state has, by some of its more recent legislation, contracted the southern boundary of Oakland so as to exclude from its limits the southern half of the estuary, and this amounts to a renunciation on the part of the city and resumption by the state of the control of so much of the grant as may have been covered by this excluded portion of the city.

It is but fair to the judge of the superior court to say that the ground upon which his decision is here overruled does not appear to have been relied upon by the state at the time the demurrers were submitted. At that time there seems to have been a general acquiescence in the view that the premises in controversy were wholly embraced in the grant to the town of Oakland, and the position assumed by the attorney general was, 1. That the grant was void; 2. That if not void it had been forfeited by the failure of the town and its successors, the city of Oakland, to perform its conditions; and 3. That, even conceding its present validity, the state could maintain an action to abate, as a public nuisance, any obstruction of the navigable waters included within the boundaries of the grant.

All of these propositions are here reasserted, but it is not necessary to decide any of them in order to dispose of this appeal.

As to the first proposition, it is involved in the case of *Oakland v. Oakland Water Front Co.*, above referred to, where it is more fully discussed by counsel, and must be carefully considered. As to the second proposition, it is to be observed that, if the grant to the town of Oakland was burdened with any conditions, they were conditions subsequent and not conditions precedent, and even conceding that the attorney general, without any action by the legislature, may proceed to enforce a forfeiture of a legislative grant for breach of a condition subsequent, the allegations of this bill are not framed to support that sort of an action.

As to the third point, it is undoubtedly true that a grant of the soil under navigable waters carries with it no right to obstruct navigation, and that the state may enjoin its grantee or his successors from erecting or maintaining structures which will impair or interfere with the exercise of the public right, if the interference is of a character that constitutes it a public nuisance. But regarding this proceeding as an action to abate nuisances, the complaint is demurrable on the ground of misjoinder of causes of action and parties defendant, as was intimated by the judge of the superior court. Each of the several defendants seems to be acting independently of the others in the erection and maintenance of the separate structures which are alleged to be obstructions to the navigation of the bay and estuary, and if so, although

each may be liable in a separate action, these different causes of action cannot be united in the same suit.

For the reasons above stated, the judgment of the superior court is reversed and the cause remanded, with leave to the plaintiff to amend its complaint as it may be advised.

Van Fleet, J., Henshaw, J., Temple, J., Harrison, J., and Garoutte, J., concurred.

McFARLAND, J., concurring.—I concur in the judgment of reversal upon the ground that it does not clearly appear that the grant to the town of Oakland includes all the land described in the complaint in this action. The description in the complaint of the premises intended to be covered by the action is somewhat difficult to follow, and I cannot see that it does not embrace some land to the southward, not included in the grant to Oakland. This point, in justice to the respondents and the court below, should have been made in the latter court; but I do not see how the attorney general can be prevented from taking any position here from which he can defend the sufficiency of the complaint. I fully concur in the view expressed in the opinion of the chief justice, that the court below properly considered the said grant to the town of Oakland.

[No. 15804. In Bank.—September 13, 1897.]

CITY OF OAKLAND, Respondent, v. OAKLAND WATER
FRONT COMPANY, Appellant.

ACTION TO QUIET TITLE—CLAIM OF CITY TO WATERFRONT—CHANGE OF PLACE OF TRIAL—DISQUALIFICATION OF JUDGES—INTEREST IN DIMINUTION OF TAXES.—In an action brought by the city of Oakland to quiet title to the city waterfront, and to determine an adverse claim thereto by a corporation defendant, the interest of superior judges who reside in the city, in the diminution of taxes, as the result of revenue to be derived from the waterfront, in case of the success of the city, is not sufficiently direct and immediate to constitute a disqualification, or to entitle the defendant to a change of the place of trial on that ground.

Id.—CONSTRUCTION OF CODE—MEANING OF "INTERESTED."—The word "interested," as used in section 170 of the Code of Civil Procedure, embraces only a direct, proximate, substantial, and certain interest in the result of the action, and does not embrace a remote, indirect,

contingent, uncertain, and shadowy interest, such as that of a taxpayer in the result of an action to establish the title of a city to its waterfront.

APPEAL from an order of the Superior Court of Alameda County, refusing to change the place of trial of an action. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

A. A. Moore, W. F. Herrin, J. C. Martin, and H. S. Brown, for Appellant.

The superior judges being taxpayers in the city of Oakland were disqualified. (*Hesketh v. Braddock*, 3 Burr. 1843; *London v. Wood*, 12 Mod. 669; *Queen v. Inhabitants etc.*, 6 Mod. 307; *Clark v. Lamb*, 2 Allen, 396; *Wood v. Stoddard*, 2 Johns. 194; *Pearce v. Atwood*, 13 Mass. 324; *Commonwealth v. McLane*, 4 Gray, 427; *Petition of Nashua*, 12 N. H. 425; *Waters v. Day*, 10 Vt. 487; *Peck v. Freeholders*, 21 N. J. L. 656; *Boston v. Baldwin*, 139 Mass. 315; *Diveny v. Elmira*, 51 N. Y. 506; *Mayor etc. of Columbia v. Goetchius*, 7 Ga. 139; *Johnson v. Mayor etc.*, 46 Ga. 80; *Fulweiler v. St. Louis*, 61 Mo. 479; *Eberle v. St. Louis Public Schools*, 11 Mo. 261; *Fine v. St. Louis Public Schools*, 30 Mo. 166; *Taylor v. Williams*, 26 Tex. 585; *Nalle v. Austin*, 85 Tex. 520; *North Bloomfield etc. Co. v. Keyser*, 58 Cal. 315, 322.)

James A. Johnson, City Attorney, William R. Davis, W. Lair Hill, E. J. Pringle, and H. A. Powell, for Respondent.

The interest of a judge as taxpayer in the acquisition of property by a city is too remote, small, and contingent to constitute a disqualification. (*Foreman v. Marianna*, 43 Ark. 324; *People v. Edmonds*, 15 Barb. 531; *Mitchell v. Holderness*, 29 N. H. 523; *Bloodgood v. Overseers of Poor etc.*, 12 Johns. 285; *Webster v. Washington County*, 26 Minn. 220; *Ellis v. Smith*, 42 Ala. 349; *Commissioners v. Lytle*, 3 Ohio, 289.)

McFARLAND, J.—This is an appeal by the defendant, a corporation, from an order of the superior court of Alameda county denying a motion of defendant for a change of the place of trial of this action from said county to some other county.

The respondent is a municipal corporation. In the complaint it is averred that the respondent is the owner in fee of certain

lands described as lying in front of said city of Oakland "below the line of ordinary high tide of the bay of San Francisco"; that appellant "claims some interest and estate in and to said lands" adverse to respondent; and that "this action is brought to determine such adverse claim." The appellant in its answer denies the title of respondent and sets up title in itself.

The motion was based upon the facts, shown by affidavit and admitted to be true, that there are four judges of the superior court of Alameda county; that one of them was "an inhabitant and a resident and elector of the city of Oakland," and was "the owner of property, real and personal, assessed," and subject to assessment and taxation by the city for all municipal purposes; that each of the others was an owner "of property" in the city assessed, etc., for municipal purposes; and that all except one were residents and electors of the city. The ground of the motion was that all of said judges were disqualified because they were owners of property subject to taxation by the city of Oakland and therefore "interested" in the result of the action, within the meaning of section 170 of the Code of Civil Procedure, which provides, among other things, that no justice or judge shall sit or act in any action or proceeding "to which he is a party or in which he is interested." The court below held that said judges were "not all of them interested in the said action," and "not all of them disqualified," and for that reason denied the motion. The theory of the appellant is, that if the respondent should recover the land sued for it might be so used as to produce some municipal revenue and thus affect to some extent the rate of taxation, as a consequence of which the taxes which the said judges would have to pay on their property might to some imaginable extent be lessened—and that thus they are interested and disqualified. If any one of the judges was not thus disqualified, of course, the court did not err in refusing to change the venue to another county, for the qualified judge could try the action; and as it appears that three of them merely owned "property" of which the character and value does not appear, it follows, upon the theory aforesaid, that if one of them owned some personal property of the value of only ten dollars, or one dollar, he would be disqualified, although his interest in reducing taxation would be so infinitesimal as to be almost impossible of

mathematical expression. If this consideration is not determinative of the present case in favor of the affirmance of the order, it at least shows upon what a slender thread the contention of the appellant hangs.

Appellant has certainly cited authorities from England and from sister states which give countenance to its contention, while respondent has cited some of an opposite character; but as no case determinative of the question involved in favor of appellant has been cited from the decisions of this court, we are at liberty to consider the question upon principle, and in view of the fact that, if the contention of appellant be sound, innumerable judgments heretofore rendered in this state by judges in the same position as that asserted here of the judges of Alameda county would have to be held void, and extreme embarrassment and confusion would follow.

In our opinion the word "interested," as used in the section of the code relied on, embraces only an interest that is direct, proximate, substantial, and certain, and does not embrace such a remote, indirect, contingent, uncertain, and shadowy interest as that asserted as a disqualification in the case at bar. The whole theory of the administration of justice in our courts contemplates that judges are persons specially educated to habits of impartiality and fairness, and it is a necessary quality of judicial proceedings that a judge shall, in his official conduct, be presumed to be above all improper considerations and motives. Nevertheless, in contemplation of the truth that in extreme cases human frailty might not be overcome by trained habits and acquired faculties, it is declared by the law that "no man shall be a judge in his own cause." But surely that means a cause which is really his own cause; not that he must be a formal party to the record, but that it must be such a cause that a judgment rendered therein would necessarily and directly and substantially affect his personal rights. We cannot conceive that the legislature meant to declare that a mere contingent possibility that some future supposable financial condition of a municipality might, in a slight degree, affect a judge as a taxpayer would strip him of all his personal judicial qualities.

The case of *North Bloomfield etc. Co. v. Keyser*, 58 Cal. 315, shows the kind of interest that does disqualify. There the mu-

nicipality of the city of Marysville had brought an action to restrain certain parties from washing mining debris into the Yuba river and its tributaries, upon the ground that it would compel the city to construct additional levees and other safeguards at great expense; and also that it was injuring, and would, if continued, practically destroy certain lands and buildings owned by the city. The respondent, Keyser, was judge of the superior court of Yuba county and owned lands on said river opposite said city; and the defendants in the action sought by a writ of prohibition to prevent him from trying the case. The court, in elaborate opinions, states the facts in detail and shows that the very judgment which would protect the lands of the city from the flow of slickens would also directly and immediately protect the land of the judge from the same evil, and that therefore he was interested and disqualified. Ross, J., who delivered the main opinion, said: "If the relief prayed for is awarded, the same judgment that stops the flow of tailings or debris on the land of the city of Marysville stops its flow onto the lands of the respondent. The very judgment that will protect Marysville will protect him. His interest, therefore, is not merely in the question of law involved in the controversy, nor is it uncertain or remote; but it is a direct and immediate interest in the result of the action." In the concurring opinion of Sharpstein, J., it is said: "The grievance of which the plaintiff complains is one of which the respondent might complain upon the same grounds. If the plaintiff can maintain the action now pending in the superior court of which the respondent is judge, he might maintain an action based upon the same grievance. He might have united with the plaintiff in bringing this action." From the stress thus put upon the peculiar relation of the judge to the subject matter of the action in that case, it is apparent that the court would have considered such interest as is alleged in the case at bar, not as "direct and immediate" but as "uncertain or remote."

Again, it has been the uniform custom in this state for judges to sit in cases when municipalities in which they were residents and taxpayers were parties; and as a judgment rendered by a disqualified judge is void, and the proceeding *coram non judice*, to maintain the contention of appellant would be to upset innumerable judgments which have stood for many years, and un-

der which many rights have accrued. A rule involving such consequences will not be declared unless it be required by the inexorable mandate of the law.

Moreover, necessity demands the affirmance of the order. If in the case at bar the judges mentioned are disqualified, no judge in the state would be qualified. It is averred here that the lands in controversy are of great value, and that there are improvements on them of the value of "many hundreds of thousands of dollars." All this immense property is, in the hands of the appellant, taxable for state purposes, but if the respondent should prevail in the action it would become municipal property and not taxable by the state. And the judge of the superior court in any county of the state who has property of the value of a watch, a bookcase, or a bed, is, under appellant's theory, interested in any case the result of which might increase state taxation, and therefore disqualified; for, under the theory, the extent of his interest is immaterial. And so, in the case at bar, the appellant is seeking to take the case away from a judge whose alleged interests are with one party, to a judge whose interests are with the other party.

The order appealed from is affirmed.

Henshaw, J., Harrison, J., Garoutte, J., Van Fleet, J., and Temple, J., concurred.

Beatty, C. J., concurred in the judgment.

Rehearing denied.

[S. F. No. 893. In Bank.—September 13, 1897.]

In the Matter of the Estate of J. G. WITTMER, Deceased.

ESTATES OF DECEASED PERSONS—DECREE OF DISTRIBUTION—DISOBEDIENCE OF EXECUTRIX—CONTEMPT PROCEEDINGS—APPEAL—DISMISSAL.—Obedience by an executor or administrator to a decree of distribution may be enforced by contempt proceedings, and no appeal will lie from the order adjudging the contempt; and where an executrix contumaciously disobeyed a decree ordering a sum of money to be distributed and paid to the assignee of a legatee, and was adjudged guilty of contempt therefor, and ordered committed to jail until she complied with the terms of the decree, an appeal taken by her from the order adjudging her in contempt must be dismissed.

IN.—APPEALS IN PROBATE PROCEEDINGS—ORDERS AFTER JUDGMENT—CONSTRUCTION OF CODE.—Appeals in probate proceedings lie only from such orders and decrees as are enumerated in section 963, subdivision 3, of the Code of Civil Procedure; and the provisions of subdivision 2 of that section, relative to appeals from orders made after judgment, are not applicable to probate proceedings.

APPEAL from an order of the Superior Court of the City and County of San Francisco adjudging an executrix guilty of contempt. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

M. C. Hassett, for Appellant.

P. L. Benjamin, for Respondent.

HENSHAW, J.—Magdalena Wittmer, executrix, filed her final account in the matter of the estate of J. G. Wittmer, and also petitioned for distribution. Her account was settled and distribution decreed. G. A. Wittmer was a legatee under the will, and had assigned his legacy, amounting to one thousand dollars, to John C. Hughes. By the decree this legacy was ordered distributed and paid to Hughes.

The executrix, failing and refusing to pay over the money, was cited to show cause. After hearing she was found to be contumacious, adjudged guilty of contempt, and was ordered committed to jail until she complied with the terms of the decree of distribution. From the order adjudging her in contempt she has taken an appeal. This is a motion to dismiss that appeal.

It is well established that obedience by executor or administrator to a decree of distribution may be enforced by contempt proceedings. (*Ex parte Smith*, 53 Cal. 204; *Ex parte Cohn*, 55 Cal. 193; *Sayers v. Superior Court*, 84 Cal. 642; *In re Clary*, 112 Cal. 292.)

Appeals in probate proceedings lie only from such orders and decrees as are enumerated in section 963, subdivision 3, of the Code of Civil Procedure. (*Estate of Calahan*, 60 Cal. 232; *Estate of Lutz*, 67 Cal. 457; *Estate of Wiard*, 83 Cal. 619.) The provisions of subdivision 2 of section 963, relative to appeals from orders made after final judgment, are not applicable to probate proceedings. (*Estate of Calahan*, *supra*; *Estate of Walkerly*, 94 Cal. 352; *Estate of Smith*, 98 Cal. 636; *Iverson v. Superior Court*, 115 Cal. 27.)

Appellant contends, however, that aside from these considerations she has an appeal as of right, and cites the case of *People v. O'Neil*, 47 Cal. 109. In that case it was so held; but *People v. O'Neil*, *supra*, has been twice overruled (*Tyler v. Connolly*, 65 Cal. 28; *In re Vance*, 88 Cal. 262); and it may be taken as finally settled that appeals will not lie to this court from judgments in contempt such as this. (*Sanchez v. Newman*, 70 Cal. 210; *Ex parte Clancy*, 90 Cal. 553; *Cosby v. Superior Court*, 110 Cal. 45.)

Whether or not an appeal will lie from an order made after final judgment declaring a person in contempt, when the object of the order of contempt is to enforce a compliance with the final judgment, is a question now under consideration by this court.

The motion is granted and the appeal dismissed.

Temple, J., Harrison, J., McFarland, J., and Van Fleet, J., concurred.

BEATTY, C. J., dissenting.—I dissent. The cases cited in the opinion of Justice Henshaw undoubtedly show that this court has more than once decided that an order made after final judgment in a probate proceeding is not appealable, and the present decision is therefore supported by abundant precedent.

I think, however, that the decisions referred to are one and all based upon an erroneous construction of section 963 of the Code

of Civil Procedure, and that it is not too late to correct the error; for no vested right would be impaired by holding now that the statute does give an appeal in a case in which the right has heretofore been denied.

The first subdivision of said section allows an appeal from a final judgment, whether entered in an action or special proceeding commenced in the superior court. A final decree of distribution of a decedent's estate is certainly a final judgment in a special proceeding commenced in a superior court, and comes within the express words of this clause.

By subdivision 2 of said section an appeal is allowed from any special order made after final judgment. Why limit this to an order made after final judgment in an action—excluding judgments in special proceedings?

The only reason suggested is, that since subdivision 3 specifies numerous interlocutory orders in probate cases from which an appeal will lie, and also specifies the decree of distribution with the rest, it was intended to cover the whole subject of appeals in probate cases. There is some slight force in this argument, it is true, and the rule of construction upon which it is based cannot be denied, but it is also true that this rule of construction is not especially persuasive, and in this case ought to give way to the far more important rule, that remedial laws should be largely and beneficially construed to advance the remedy.

There is certainly as much necessity for an appeal from an order made after final decree of distribution for the purpose of carrying it into effect as there would be from any order made to enforce a decree of specific performance, or a judgment for the recovery of land—or any other judgment in a suit in equity or action at law. This being so, I think a liberal construction in favor of the remedy should be given to this statute rather than a narrow and technical one which takes away the remedy.

[No. 18,801. In Bank.—September 13, 1897.]

S. PROUTY, Appellant, v. L. A. DEVIN, et al., Respondents.

MORTGAGES—ACTION TO DETERMINE PRIORITY—PRIOR RECORDATION OF SECOND MORTGAGE—NOTICE—FINDINGS—OMISSION TO FIND UPON CONSTRUCTIVE NOTICE—FACTS PUTTING UPON INQUIRY—APPEAL.—In an action to determine the priority of plaintiff's mortgage, which was first executed, over defendant's mortgage upon the same property which was later in execution, but prior in recordation, where there was evidence upon the question of constructive notice, which it was necessary for the trial court to pass upon, and to determine whether the defendant did or did not have actual notice of circumstances sufficient to put a prudent man upon inquiry as to the fact of the existence of the prior mortgage, of which he might have learned by prosecuting such inquiry by ordinary diligence and understanding, it is not sufficient for the court to find that the defendant had no actual notice of its existence, but the question of constructive notice thereof must also be passed upon, and, in case of omission to find thereupon, a judgment in favor of the defendant must be reversed upon appeal.

APPEAL from an order of the Superior Court of Sacramento County denying a new trial. W. C. Van Fleet, Judge.

The facts are stated in the opinion of the court.

Johnson, Johnson & Johnson, and Albert M. Johnson, for Appellant.

Judson Brusie, for Respondents.

HENSHAW, J.—Plaintiff, Prouty, was the owner of a mortgage executed by the defendant Mrs. L. A. Devin. He brought his action seeking a decree establishing his mortgage as a lien upon the property prior to that of a mortgage executed by Mrs. Devin and her husband to defendant Bates, which last mortgage was later in execution, but prior in recordation.

The undisputed facts are, that Mrs. Devin purchased the property upon which the mortgages were given, paying therefor eight thousand dollars, five thousand dollars of which was lent to her by defendant Bates, who is her father. For the remainder of the purchase price, three thousand dollars, she executed a mortgage. Mrs. Devin afterward discounted the joint note of herself and husband, indorsed by plaintiff, Prouty, at the

National Bank of D. O. Mills, and with the proceeds discharged the mortgage. When this note became due payment was demanded of the makers and of the indorser. Finally the bank placed the note in the hands of its attorney, and notified Prouty and the Devins that if it was not paid on or before Saturday, December 27, 1890, suit would be commenced against them. Mrs. Devin came to Sacramento for the purpose of raising money upon the property with which to pay the note due the bank. Prouty secured the three thousand dollars, and deposited it with Leonard & Son, real estate dealers, to be by them lent to Mrs. Devin upon the execution by her and her husband of a mortgage upon the premises. The mortgage and mortgage note were drawn up, and were awaiting execution at the office of Leonard & Son. Mrs. Devin was informed of the fact, and went in search of her husband to have him join with her in the execution of the instruments. She could not find him, and returned shortly before 3 o'clock in the afternoon to the office of the real estate dealers with this information. The bank demanded payment upon that day. She suggested that she should execute the note and mortgage, and take the money and pay it over to the bank, and that her husband would call in upon Monday morning and join in the execution. This was acceded to, she executed the note and mortgage, the money was delivered to her, and by her in turn paid in extinguishment of her note at the bank. Early the following Monday morning Bates and his daughter, Mrs. Devin, with her husband, went to the office of an attorney at law, where the Devins executed to him a mortgage in the sum of five thousand dollars, which he immediately caused to be recorded, while in the office of Leonard & Son they were waiting for Mrs. Devin's husband to call in and join in the execution of the note and mortgage as had been agreed upon.

The mortgaged property was the separate property of Mrs. Devin.

The complaint charged the defendants with a fraudulent conspiracy, setting out the facts and circumstances with much detail, and in paragraph 9 averred that at all the times named the defendant Bates had full, ample, and complete notice and knowledge of all the facts in the complaint alleged. The court found

that "the allegations of paragraph 9 of the complaint are not true. On the contrary, I find that when Bates took said mortgage he had not been informed that said L. A. Devin had already executed the mortgage to plaintiff. The defendant W. B. Devin had informed Bates that plaintiff was trying to get said Devin and defendant L. A. Devin, his wife, to execute a mortgage, but did not tell him that the latter had already executed the mortgage, and Bates took his mortgage without knowledge of the fact that said L. A. had before that executed the mortgage to plaintiff."

Section 1217 of the Civil Code provides that an unrecorded instrument is valid as between the parties thereto and those who have notice thereof. Notice is actual and constructive. Actual notice is that which consists in express information of a fact, and constructive notice is that which is imputed by law. (Civ. Code, sec. 18.) "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which by prosecuting such inquiry he might have learned such fact." (Civ. Code, sec. 19.)

The finding of the court above quoted amounts to a declaration that the allegations of paragraph 9 are not true, but that the recital which therein follows sets forth the facts. In its statement of facts it will be observed that the court finds merely that defendant Bates did not have actual notice of the prior mortgage, for the affirmative recital set out by the court is a specification of the particulars in which paragraph 9 is untrue. But that specification is silent upon the subject of the constructive notice to defendant Bates, and there is thus the absence of a necessary finding in the case, namely, a finding as to whether or not the defendant Bates had constructive notice.

That such a finding is necessary to a determination of the case the most cursory reading of the evidence at once establishes, for the general doctrine, as well as the express provision of section 19 of our Civil Code, is that whatever puts a party on inquiry amounts in judgment of law to constructive notice, provided the inquiry becomes a duty, and if followed would lead to the knowledge of the requisite facts by ordinary diligence and understanding. (*Bank of Mendocino v. Baker*, 82 Cal. 114.)

Defendant Bates testifies: "Well, I wanted a mortgage on that place, and I wanted it before anybody else got a mortgage recorded. I didn't want a second mortgage, and I wanted to get my mortgage on record early Monday morning." Again, having testified that he never before had asked his daughter to secure him for the money he had lent her, he is asked: "Why did you do so in this instance? A. Because I smelt a mouse. Q. You smelt a mouse? A. Yes; on Sunday. Q. What sort of a mouse? A. They were trying to raise the money, and they were going to mortgage the place, and if they were going to mortgage the place I wanted the money that they owed me first. Q. But, particularly, did you know anything about it? A. Well, sometimes a man doesn't have to get his head knocked off to know something." Again he says: "And I wanted to get my mortgage on ahead of Prouty's, because a man would be a natural damned fool to want a mortgage after somebody else had recorded his, and I wasn't fool enough to take a second mortgage, because I didn't suppose that Prouty had his mortgage on yet, because Will told me he hadn't signed it yet." Again, when asked if he did not know that his daughter had executed the mortgage to Prouty before she made the one to him, he replied: "Well, I heard several things. I was standing round, and I had heard the telephone ring, and they had talked through it inquiring for this and that, and I saw things, and I had a right to make up my mind. Q. You were satisfied then before that she had signed it? A. I was satisfied I got my mortgage first. Q. But before that you were satisfied that she had signed the Prouty mortgage? A. I didn't know whether she had or not, but I knew Will hadn't. Q. You say you didn't know; were you satisfied or not? A. I didn't know or care to inquire about it. I didn't care to take any notice about it at all."

These quotations might be indefinitely multiplied. They are here made, not as expressing the views of this court as to whether or not Bates had constructive notice, but in illustration of the fact that there was evidence upon the question of constructive notice which it was necessary for the trial court to pass upon. For its oversight in this regard the judgment and order must be reversed and the cause remanded. But, before conclud-

ing, it may be proper to add that the evidence here does not disclose the case for which the respondents contend, a case illustrated by *Worden v. Adams*, 15 Mass. 236. In that case A, a mortgagee, delivered his mortgage to a scrivener for the purpose of having an assignment thereof made to B, his creditor. Before such assignment was prepared and executed, and while the mortgage deed was in the scrivener's hands, A made an assignment of the mortgage upon a separate paper to another creditor, C. This assignment to C was acknowledged and recorded before the assignment to B was completed, C knowing, however, that the mortgage deed had been delivered to the scrivener for the indicated purpose. It was there held that the knowledge imputed to C of an intention upon the part of A to assign the mortgage to B did not impair his title, C "having a right by his vigilance to secure his demands in this way, just as he would have had by an attachment, although he might know that another creditor intended to make an attachment, and had taken incipient measures therefor." In that case C's assignment was valid because at the time it was executed and recorded the assignment to B had not been perfected, and the notice to C, if he had followed it up by inquiry, would have resulted in the knowledge that there was no pre-existing assignment. In the case at bar, however, the contention is, and the uncontradicted evidence shows, that there was a valid, executed, and existing mortgage upon the property at the time when Bates took his mortgage. The question for determination is, whether there was actual notice upon the part of Bates of circumstances sufficient to put him as a prudent man upon inquiry. If so, then in law he is chargeable with constructive notice and knowledge of the fact of this pre-existing mortgage.

The judgment and order are therefore reversed and the cause remanded.

Temple, J., McFarland, J., Harrison, J., Van Fleet, J., and Garoutte, J., concurred.

[Crim. No. 288. In Bank.—September 14, 1897.]

THE PEOPLE, Respondent, v. JOHN T. NEWCOMER, Appellant.

CRIMINAL LAW—HOMICIDE—SELF-DEFENSE—INTENTION TO KILL—ERRONEOUS INSTRUCTION.—Upon the trial of a defendant accused of murder, where the testimony for the defendant tended to show that the killing was done in self-defense, an instruction as to the presumption of intention to kill from the fact of shooting at and killing the deceased, which concludes with the statement that "unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless," is erroneous as to such conclusion, as the defendant might have intended to kill, and yet have been guiltless.

ID.—INSTRUCTION AS TO REASONABLE DOUBT—USE OF WORD "DEMONSTRATE." An instruction that "it is sufficient if he [the defendant] demonstrate to your understanding by testimony given, by inferences correctly and properly drawn from the whole testimony in the case, that notwithstanding the burden so cast upon him, there still exists in your mind a reasonable doubt of his guilt," though unhappily expressed in the use of the word "demonstrate," is not for that reason ground for reversal, as, taken in connection with the context, the jury could not have understood the instruction as requiring anything more than the raising of a reasonable doubt.

ID.—WAYS AND METHODS OF WEIGHING TESTIMONY—PROVINCE OF JURY—IMPROPER INSTRUCTION—ERROR WITHOUT INJURY.—The jury alone has power to weigh the testimony of witnesses and to determine the facts, and it is not proper for the court to instruct them as to ways and methods by which they shall exercise their powers; but, where the instruction merely tells the jury to do certain things which jurors would evidently do without being told, the error is without injury, and not ground of reversal.

ID.—INSTRUCTION AS TO SELF-DEFENSE—DUTY OF AGGRESSOR TO DECLINE FURTHER STRUGGLE—LANGUAGE OF CODE—IMMATERIAL DEPARTURE.—In giving an instruction as to the conditions under which the right of self-defense may be asserted, it is better to use the words of section 197 of the Penal Code, when the court is endeavoring to state the principle announced in the statute; but where the court has used the statutory words in another part of the charge, in regard to the duty of an aggressor to "have endeavored to decline any further struggle," the statement that he must have "in good faith withdrawn from the contest before any fatal blow was given," is not such a material departure as to mislead the jury, and will not justify a reversal of the judgment.

ID.—DEFENDANT AS FIRST ASSAILANT—CREATING NECESSITY FOR SELF-DEFENSE—INAPT FORM OF INSTRUCTION.—An instruction to the effect that a necessity for self-defense cannot be created where the cause of the homicide originates in the fault of the party committing it, unless

he in good faith first declines further struggle, would be better founded upon a clear statement of the hypothesis that the defendant was the first assailant; but where an instruction assumes that the cause of the homicide "originates in the fault of the party himself, in a quarrel which he has provoked and brought on, in a danger which he has voluntarily brought upon himself by his own misconduct and lawlessness," and concludes that he cannot, "upon killing the person with whom he seeks the difficulty, interpose the plea of self-defense; unless, if he was the aggressor, that he had really and in good faith endeavored to decline any further struggle before the mortal blow was given," it cannot be assumed, considering the latter part of the instruction, that the jury would understand from the first part of it, that, if the defendant had merely used disagreeable and provoking words, he could not defend himself against an attack of the deceased brought on by such words; and though the instruction, taken as a whole, is in a form not approved of, its inaptness of form is not alone sufficient to warrant a reversal of the judgment.

ID.—REASONABLE DOUBT AS TO DEGREE OF CRIME—FORM OF INSTRUCTION AS TO VERDICT—ACQUITTAL OF "HIGHER" OFFENSE.—An instruction as to what verdict should be rendered, where there is a reasonable doubt as to the degree of the crime, would better be given in the statutory language of section 1097 of the Penal Code, which provides that "when it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only"; but where an instruction, in a case of homicide, states that the jury "may, if the evidence warrants it, find the defendant guilty of murder in the first degree, or murder in the second degree, or of manslaughter," and that "should the jury entertain a reasonable doubt as to which of the grades of crime named the defendant may be guilty of, if any, they will give the defendant the benefit of the doubt, and acquit him of the higher offense," the instruction is not misleading, and does not tell the jury merely to acquit of the highest of the three offenses named, and it is not to be presumed that the jury understood the word "higher" in any other than its grammatical sense as denoting one of two things.

ID.—BURDEN OF PROOF—REASONABLE DOUBT—REFUSAL OF INSTRUCTION.—Where there is nothing in the evidence for the prosecution to take the case out of the rule declared in section 1105 of the Penal Code, that "the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable," and where the court has properly instructed the jury upon the subject of the burden of proof, and that it is sufficient if the defendant raises a reasonable doubt of his justification, it is proper to refuse an instruction asked by the defendant to the effect that the burden of proving circumstances that justify the killing of the deceased by the defendant does not rest upon the defendant.

ID.—SUDDEN ATTACK UPON PERSON WITHOUT FAULT—RIGHT TO STAND GROUND—NO DUTY TO FLEE—IMPROPER MODIFICATION OF INSTRUCTIONS—CASE

CRITICISED.—The duty of the defendant to flee rather than to kill, if retreat is possible, only applies where the defendant is the assailant; but when a defendant who is himself without fault is suddenly attacked in a way that puts his life or bodily safety at imminent hazard, he is not compelled to fly or to consider the proposition of flying, but may stand his ground and defend himself to the extent of taking the life of the assailant, if that be reasonably necessary; and an instruction requested embodying the right of a person who is without fault to stand his ground against an assailant, and to slay him under appearances justifying it, "even if it be proved that he might more easily have gained his safety by flight," should be given as asked, and it is error to modify it so as to instruct the jury that "if he could have withdrawn from the danger, it was his duty to retreat," and that "between his duty to flee and his right to kill he must fly."

ID.—ATTACK IN ONE'S OWN HOUSE—SELF-DEFENSE—FLIGHT NOT REQUIRED—PREJUDICIALLY ERRONEOUS MODIFICATION OF INSTRUCTION.—When a man without fault is suddenly attacked in his own house, in a murderous or dangerous manner, he is not called upon to flee from his home, nor to consider the proposition of so fleeing; and where the defendant testified that he was assaulted by the deceased with a pistol, when he was in his own home, and that in order to protect his own life he was compelled to shoot, and did shoot, the deceased first, an instruction properly based upon that evidence should be given as requested by the defendant; and a modification of the instruction, so as to ignore the defendant's evidence, and to treat him as an aggressor whose duty it was to flee rather than to kill, if retreat were possible, is inapplicable, and prejudicially erroneous.

APPEAL from a judgment of the Superior Court of Tuolumne County and from an order denying a new trial. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

J. S. Robinson, J. B. Curtin, and Byron Waters, for Appellant.

W. F. Fitzgerald, Attorney General, and Henry E. Carter, Deputy Attorney General, for Respondent.

McFARLAND, J.—The defendant was charged with the murder of one Caleb Dorsey, and was convicted of murder in the second degree. He appeals from the judgment and from an order denying his motion for a new trial.

The appellant bases his contention for a reversal upon the grounds: 1. Insufficiency of the evidence to justify the verdict; and 2. Errors committed by the court in its instructions to the

jury. As in our opinion, the judgment must be reversed upon the second ground, it is not necessary to consider the first ground.

Although the evidence taken at the trial occupies a good many pages of the transcript, a great deal of it is unimportant. The material evidence and the real facts to be determined by the jury lie within very narrow limits. In order to illustrate the bearing of the instructions objected to upon the real merits of the case, it is proper to make a very short statement of the conditions under which the homicide was committed. The appellant and the deceased were mining partners, and joint owners of certain mining property upon which at the time of the homicide they were conducting mining operations. There was a small cabin on the premises in which appellant slept and ate; and it was actually and legally his home. On the morning of the homicide the deceased and the appellant went into that cabin; and while they were there, no other person being present or within sight of them, the appellant killed the deceased by shooting him with a pistol. Immediately thereafter the defendant left the cabin and locked it; got a horse that was on the premises, and rode to the county seat of the county and delivered himself up to the sheriff. Before he procured the horse he told one or two persons that the deceased had gone up into the hills to look after some timber, but as soon as he had mounted the horse and was ready to leave he told one of the employees that he had killed the deceased, gave him the key of the cabin and told him to open it, and that he, appellant, was going to deliver himself up to the sheriff. He gave as the reason why he did not tell the first persons he saw that he had killed the deceased that he feared violence and did not want it to be known until he was ready to leave. He testified at the trial that at the time of the homicide the deceased was about to shoot him, appellant, with a pistol, and that in order to protect his own life he was compelled to shoot, and did shoot the deceased first. He testified that from what the deceased had himself told him, and from other information which he had received of the character of the deceased, the latter was a determined man, highly irascible, and accustomed to use firearms when excited. There had been some differences between the

parties of a rather unfriendly character about the management of the mine; and there was evidence other than the testimony of the appellant that the deceased, in case of any sharp dispute with appellant, was liable to kill the latter, and had made threats of violence against him. Under these circumstances, if the appellant was justified in killing the deceased, as he might have been, he was in the embarrassing position of one who justly kills another when there is no other witness to the homicide, when he has to admit the homicide and depend greatly upon his own testimony to justify it. In such a case it is evident that a jury will have difficulty in determining the real facts; and in such a case it is apparent that the instructions of the court are very important—particularly when, as in the case at bar, the court instructs at great length. Under such circumstances, any instruction tending to lead the jury from the real issues in question is material, and if erroneous is reversible error.

In our opinion, the judgment must be reversed on account of a modification which the court made to the fourth instruction asked by the appellant, on pages 55 and 56 of the printed transcript.

But as a new trial must be ordered, for the benefit of the court upon another trial certain other instructions must be noticed.

The first instruction objected to by appellant is as follows: "Every person is presumed to intend what his acts indicate his intention to have been, and, if you find from the evidence beyond a reasonable doubt that the defendant shot the deceased with a pistol and killed him, the law presumes that the defendant intended to kill the deceased; and, unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless." Appellant objects to this because it omits to state that this presumption does not arise where "the proof on the part of the prosecution tends to show" that the killing was justifiable. It is evident, however, that this instruction does not deal with the question as to when the burden of proof is on the defendant to show that the killing was justifiable; it deals only with the question of the intent to kill. In this view the instruction would not have been erroneous if it

had not closed with the expression, "the law will not hold him guiltless." The court no doubt intended to say that the shooting of the deceased with a pistol was sufficient proof of his intent to kill, in the absence of any other evidence tending to show that he did not intend to kill; but the conclusion that in the absence of any such other proof "the law will not hold him guiltless" was erroneous, because he might have intended to kill and yet have been guiltless.

Appellant also objects to the following part of the charge: "It is sufficient that he demonstrated to your understanding, by testimony given, by inferences correctly and properly drawn from the whole testimony in the case, that notwithstanding the burden so cast upon him, there still exists in your mind reasonable doubt of his guilt." The stress of this objection was directed to the word "demonstrate." As was said in a former case, "demonstrate" is an unhappy word to be used in this connection; but as was there said, we do not think that, considered in connection with the context, the jury could have thought it meant anything more than the raising of a reasonable doubt; and we do not think that the use of that word would be sufficient to warrant a reversal.

The court instructed the jury that "you should carefully scrutinize all the testimony in this case, and in doing so consider all the circumstances under which each witness has testified, his degree of intelligence, his manner on the witness stand," and then follows other matters which the court tells the jury they ought to consider in estimating the value of the testimony of witnesses. Appellant objects to this instruction upon the ground that it goes farther than the instruction approved in *People v. Cronin*, 34 Cal. 200; that this court has frequently disapproved of the instruction in the *Cronin* case, advised its omission, and has suggested that a case would be reversed if that instruction were given with any matters of importance added to it. But the instruction in the *Cronin* case was expressly directed to the testimony of the defendant in that case, while in the case at bar the instruction is general, and refers to any and all witnesses. The instruction here, therefore, cannot be considered erroneous upon the ground that it adds to the instruction in the *Cronin* case. Indeed, in this present case, at

the request of the prosecution, an instruction was given referring to the testimony of the appellant in the precise language used in the Cronin case; and to that instruction the appellant takes no exception. In our opinion the instruction now under consideration was improper because it went beyond the legitimate province of a court. Under our system, the jury alone has power to weigh the testimony of witnesses and to determine the facts, and it is not proper for the court to direct them as to the ways and methods by which they shall exercise their own powers. Still it is quite evident that, while the instruction was outside of the proper powers of the court, it could not possibly have done any harm; for it was merely telling the jury to do certain things which jurors would evidently do without being so told. Therefore it was not reversible error.

Appellant objects to the following part of the charge: "The right of self-defense is expressly recognized by our Penal Code, which I have just read to you, and the conditions under which it may be asserted are clearly defined. They are, among others, that the party was not the first aggressor; or, if he was the aggressor, that he had in good faith withdrawn from the contest before any fatal blow was given."

The objection to this instruction is that the words "withdrawn from the contest" were used instead of the statutory words used in subdivision 3 of section 197 of the Penal Code, to wit, "have endeavored to decline any further struggle." It would certainly have been better to have used the words of the statute whenever the court was endeavoring to state the principle announced in the statute; but, as the court had used the statutory words in another part of the charge when this principle was being stated, we hardly think that the jury was led astray by that part of the charge objected to. And we do not think that this omission alone would justify a reversal of the judgment.

Appellant also objects to the following part of the charge: "But a cause which originates in the fault of the party himself, in a quarrel which he has provoked and brought on, in a danger which he has voluntarily brought upon himself by his own misconduct and lawlessness, cannot be and is not considered in law a reasonable or sufficient ground to support the right of self-defense. No man, by his own lawless act, can create a necessity

for acting in self-defense, and then, upon killing the person with whom he seeks the difficulty, interpose the plea of self-defense; unless, if he was the aggressor, that he had really and in good faith endeavored to decline any further struggle before the mortal blow was given." The objection to this charge is directed principally to the first part of it, and it is contended that the words "fault of the party himself," and "a quarrel which he had provoked and brought on," tended to induce the jury to believe that if the appellant had merely used some disagreeable words to the deceased, that the use of such words would have been a "fault," and a provocation which would have taken away from him the right to defend himself against an attack of the deceased brought on by such words. Considering the latter part of the instruction, we hardly think that the first part is susceptible of the construction given to it by appellant; and although we cannot approve the whole of the instruction as it stands, still it alone would not warrant a reversal of the judgment. In an instruction upon that subject it would be better to found it upon a clear statement of the hypothesis that the defendant was the first assailant.

The court gave the following: "Under the information in this case, you may, if the evidence warrants it, find the defendant guilty of murder in the first degree, or murder in the second degree, or of manslaughter. Should the jury entertain a reasonable doubt as to which of the grades of crime named the defendant may be guilty of, if any, they will give the defendant the benefit of the doubt, and acquit him of the higher offense." Appellant contends that this is an erroneous and misleading statement of the principle declared in section 1097 of the Penal Code, because it supposes a doubt as to three degrees, and merely tells the jury that in such event they should acquit of the highest of the three; while the code refers to a doubt as to two degrees, and declares that there can then be a conviction of only the lowest. This criticism is not without some plausibility; but the language of the instruction cannot be magnified into a reversible error. In its grammatical meaning the word "higher" means one of two things, and it is not to be presumed that the jury understood it in any other sense, or were at all led astray

by the instruction. Of course, the use of the statutory language would have been better.

We do not think that the court erred in refusing to give the instruction asked by appellant to the effect that "in this case the burden of proving circumstances that justify the killing of the deceased by the defendant does not rest upon the defendant." We see nothing in the evidence offered by the prosecution to take this case out of the rule declared in section 1105 of the Penal Code. Of course, under former decisions it is sufficient if a defendant raises a reasonable doubt of his justification; and that principle was fully stated in the charge.

The fourth instruction asked by appellant, and hereinbefore referred to, is as follows: "Where one without fault is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony or some great bodily injury upon him, and to afford grounds for a reasonable belief, as a reasonable man, that there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, slay his assailant and be justified by the appearances. And, as where the attack is sudden and the danger imminent, he may increase his peril by retreat, so situated he may stand his ground, that becoming his 'wall,' and slay his aggressor, even if it be proved that he might more easily have gained his safety by flight." This instruction was clearly right and should have been given, as requested by appellant, without any modification. (*People v. Hecker*, 109 Cal. 467.) The court, however, added to the instruction quite a long modification, as follows: "The rule in such cases is this: What would a reasonable person, a person of ordinary caution, judgment, and observation, in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from this situation and these surroundings? If such reasonable person so placed would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and acting upon such appearances. The defendant is not necessarily justified because he actually believed that he was in imminent danger. When the danger is not apparent, and not actual and real, the question is: Would a reasonable man, under all the circumstances, be justified in such belief? If so the de-

fendant will be so justified. If this was defendant's position it was his right to repel the aggression, and fully protect himself from such imminent danger. If he could have withdrawn from the danger, it was his duty to retreat. Between his duty to flee and his right to kill, he must fly; or, as the books have it, must retreat to the wall; but by this is not meant that a party must always fly, or even attempt flight; the circumstances of the attack may be such, the weapon with which he is menaced of such a character, that retreat might well increase his peril. By 'retreating to the wall' is only meant that the party must avail himself of any apparent and reasonable avenues of escape by which his danger might be averted and the necessity of slaying his assailant avoided."

Under the authorities cited and quoted in the opinion of this court in *People v. Lewis*, 117 Cal. 186, the modification of said instruction by the court as above stated was erroneous. The language of the modification constitutes part of a long charge by the lower court given in *People v. Iams*, 57 Cal. 115. The opinion of the appellate court in that case deals almost entirely with questions which did not arise out of the instructions to the jury; but in a few lines at the close of the opinion the entire charge of the court to the jury, which was a very long one, was approved. It does not appear from the report of the case what particular part of the charge was objected to by the appellant in that case, or that the part of the charge which constitutes the modification in the case at bar was particularly called to the attention of the court. In *People v. Williams*, 73 Cal. 531, this court says, with respect to the charge in the *Iams* case, that "but a small part of it was really involved in the exceptions taken in that case, and as to the rest it was obiter; and in *People v. Lewis, supra*, that part of the charge in the *Iams* case which constitutes the modification in the case at bar was reviewed, and it was substantially said that it was applicable only to cases where the defendant was the assailant. It is to be observed that the instruction in the case at bar which the court modified commences with the words, "where one without fault is placed under circumstances sufficient," etc., and the whole instruction as modified refers entirely to the case where the defendant is "without fault." It goes upon the theory that where one entirely without fault himself is sud-

denly attacked under such circumstances as to induce a reasonable man to believe that he was in imminent danger of immediate death or great bodily harm, he must fly, if flight was apparently possible. The modification says that under such circumstances, "if he could have withdrawn from the danger it was his duty to retreat." Then comes this remarkable clause: "Between his duty to fly and his right to kill, he must fly." Perhaps it might be said that this language taken literally does not mean anything. It might be said that "his duty to flee" and "his right to kill" cannot both exist at the same time, and that therefore there could be nothing "between" them; but how could the jury take it to mean anything else than that when a man, although without fault himself, is assailed in the manner described, he must in all cases fly, if flight be possible? But that is not the law; of course, a man is not justified in seeking an affray, but when a man without fault himself is suddenly attacked in a way that puts his life or bodily safety at imminent hazard, he is not compelled to fly or to consider the proposition of flying, but may stand his ground and defend himself to the extent of taking the life of the assailant, if that be reasonably necessary. This is the law as expressed in *People v. Lewis, supra*, and the authorities there cited, in *People v. Hecker*, 109 Cal. 467, and by the highest court of the land in *Beard v. United States*, 158 U. S. 550. In *People v. Hecker, supra*, this court says: "So that while the killing must still be under an absolute necessity, actual or apparent, as a matter of law that absolute necessity is deemed to exist when an innocent person is placed in such sudden jeopardy. The right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense." Moreover, the appellant in the case at bar was in his own house at the time of the homicide, and therefore the case is not essentially different in this respect from that of *People v. Lewis, supra*, where it was held that a person attacked in his own house need not flee, and that to such a situation the language used in the modification now under review was inapplicable and erroneous. The only difference between the two cases is, that in the Lewis case the deceased was on the outside of the house and was approaching it for the purpose of making a deadly assault upon the defendant who was within

the door; while in the case at bar appellant and deceased were both in the house, the latter not having been, in the first instance, a trespasser. But when a man "without fault" himself is suddenly attacked in his own house in a murderous or dangerous manner, he is not called upon to flee from his home, or to consider the proposition of so fleeing. Therefore, whether or not the language of the modification would be admissible under any circumstances, it was clearly in the case at bar, and, in the connection in which it was used, inapplicable, erroneous, and prejudicial to appellant; and for this reason the judgment must be reversed. Of course, the jury were not bound to take the testimony of the appellant as true; but instructions should not ignore any findings of fact which a jury might reasonably make upon the evidence before them. The main issue of fact in the case was, Did the evidence raise a reasonable doubt as to the question whether or not the killing of deceased by appellant was really done in self-defense? And to aid the jury in determining this issue it would seem that nearly all matters of law proper to be given by way of instructions could be found in the language of the code.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

Henshaw, J., Temple, J., Harrison, J., Van Fleet, J., and Garoutte, J., concurred.

[S. F. No. 555. Department One.—September 15, 1897.]

A. D. GRIMWOOD, Respondent, v. J. E. BARRY, Justice of the Peace, etc., Appellant.

JUSTICES' COURT—ACTION UPON STOCKHOLDER'S LIABILITY—PROOF AND JUDGMENT AGAINST DEFAULTING DEFENDANT—TRIAL AS TO ANSWERING DEFENDANTS—SEVERAL JUDGMENTS—JURISDICTION—MANDAMUS.—In an action in the justice's court against a number of stockholders of a corporation to enforce their individual liability for the indebtedness of the corporation to the plaintiff, there may possibly be as many diverse issues made, and as many trials had, resulting in several judgments, as there are several defendants; and proof made and judgment rendered

against a defaulting defendant cannot operate as a dismissal of the action against answering defendants, or affect the jurisdiction of the court to try the cause as to them; and mandamus will lie to compel the justice to proceed with such trial.

Appeal from a judgment of the Superior Court of the City and County of San Francisco. D. J. Murphy, Judge.

The facts are stated in the opinion.

W. H. Mahoney, for Appellant.

There can be but one trial and judgment in the justices' court. (Code Civ. Proc., secs. 850, 873, 892.) The jurisdiction of the justices' court is special and limited, and it is not governed by provisions applicable to courts of record, in relation to trials and judgments. (*Weimmer v. Sutherland*, 74 Cal. 341; *Swain v. Chase*, 12 Cal. 283; *Rowley v. Howard*, 23 Cal. 401; *Jolley v. Foltz*, 34 Cal. 321; *Kane v. Desmond*, 63 Cal. 464; *Keybers v. McComber*, 67 Cal. 395.)

Boyd & Fifield, for Respondent.

In an action upon stockholder's liability the judgments are required to be several. (Civ. Code, sec. 322; *Derby v. Stevens*, 64 Cal. 287.) The justices' courts have jurisdiction over such actions. (*Dennis v. Superior Court*, 91 Cal. 548; *Derby v. Stevens*, *supra*.) Section 322 of the Civil Code, and sections 187 and 579 of the Code of Civil Procedure are applicable to such an action in the justices' court, by the nature of the case. (Code Civ. Proc., sec. 925.)

BRITT, C.—Mandamus. An action was brought by Grimwood in the justices' court of the city and county of San Francisco against Charles M. Plum, Emma D. Taylor, and others, stockholders in a certain corporation, to enforce the individual liability of the defendants therein, respectively, for alleged indebtedness of the corporation to said Grimwood. Five of the defendants in that action appeared and answered, putting in issue the allegations of the complaint there. The defendant Taylor, being duly served with process, suffered default; thereupon, the plaintiff made proof of his cause of action against her before Barry, the appellant here, who was the justice to whom

such action was assigned for trial, and judgment was entered against said Taylor for the amount of her several liability as alleged in said complaint. Afterward the plaintiff moved said justice to try the action against the defendants who had answered; the motion was denied on the ground that since a trial had been had and a judgment taken as to the defendant in default, the court had no further jurisdiction of the case; that such trial and judgment operated as a dismissal in favor of the defendants who had appeared. Grimwood then instituted the present proceeding in the superior court for a mandamus to compel the justice to proceed to the trial of the cause as demanded by the said motion which had been denied; the court granted the writ, and hence this appeal.

The writ was properly awarded. Section 322 of the Civil Code provides, among other matters concerning the liability of stockholders, that "any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each in conformity therewith." It is obvious that under this statute there may possibly be as many diverse issues made, and as many trials had, resulting in several judgments, as there are separate defendants; so that the disposition of the case as to one defendant can have no effect on the right and duty of the court to "ascertain"—such is the language of the statute—"the proportion of the claim or debt for which each defendant is liable," and to render judgment "in conformity therewith." Appellant claims that certain code sections relating to trials in justices' courts—Code Civ. Proc., secs. 850, 873, 892—sustain the view taken by him of his duty in the case. We are, however, unable to deduce from them any rule at variance with the conclusion above stated. Whether, in an action founded on the joint liability of two or more defendants, the jurisdiction of a justice's court to proceed further would be affected by the taking of judgment by default against some but not all of the persons sued—is a question not necessary for pre-

ent consideration. The judgment appealed from should be affirmed.

Belcher, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Harrison, J, Van Fleet, J., Garoutte, J.

[S. F. No. 633. Department One.—September 15, 1897.]

In the Matter of the Estate of JOHN McDONALD, Deceased.

ESTATES OF DECEASED PERSONS—DEATH OF SOLE EXECUTRIX—LETTERS WITH WILL ANNEXED—RIGHTS OF PUBLIC ADMINISTRATOR AGAINST SISTER OF EXECUTRIX—DISCRETION—WAIVER OF COMMISSIONS.—Where a widow was appointed sole executrix of the will of her deceased husband, but died several years after his death, without having applied for letters, the public administrator is entitled to letters of administration upon the estate of the deceased husband with the will annexed, as against the sister of the deceased executrix, who was executrix of her will; and the court has no discretion to refuse such letters to the public administrator, and to grant them to the sister of the deceased executrix, notwithstanding her offer to waive commissions, in the interest of the estate.

Id.—CONSTRUCTION OF CODE—DEFAULT IN LETTERS TESTAMENTARY—DEATH OF EXECUTOR BEFORE PROBATE OF WILL—GRANT OF LETTERS AS IN CASES OF INTESACY.—Under section 1350 of the Code of Civil Procedure, which provides that "if the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued as designated and provided for the grant of letters in cases of intestacy," it is the manifest intention of the legislature to make the provisions of section 1365 of the same code, regulating the grant of letters in cases of intestacy, applicable in any case provided for in section 1350, including cases where the executor dies before the will has been probated or letters have been issued.

APPEAL from an order of the Superior Court of the City and County of San Francisco, granting letters of administration, with the will annexed, and denying the application of the public administrator therefor. Charles W. Slack, Judge.

The facts are stated in the opinion.

J. D. Sullivan, for Appellant.

W. A. Plunkett, for Respondent.

CHIPMAN, C.—John McDonald died testate in December, 1879, naming his wife, Rosanna, executrix of his will. Rosanna died testate in December, 1893, naming her sister, Cecelia McNeil, executrix of her will, without having commenced proceedings to probate the will of her said deceased husband.

On October 15, 1895, Cecelia McNeil applied for letters of administration with the will annexed of the said John McDonald, deceased, and on October 21, 1895, A. C. Freese, public administrator of the city and county of San Francisco, made a like application. Upon the hearing of the petitions the court granted letters to the said Cecelia McNeil and denied the petition of the said Freese. The proceeding is here upon the appeal of the public administrator from the order of the court granting letters to the said Cecelia McNeil.

Appellant claims, as of right, that by the provisions of section 1350 of the Code of Civil Procedure, he was entitled to letters of administration. That part of the section relied upon reads as follows: "If the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued *as designated and provided for the grant of letters in cases of intestacy.*" Section 1365 of the Code of Civil Procedure prescribes the order in which the persons therein designated are entitled to "administration of the estate of a person dying intestate." This list of persons includes the public administrator, but does not include the sister of the widow of deceased, respondent here. Respondent concedes that she has no prior right over appellant, but insists that the case is not governed by section 1350 of the Code of Civil Procedure, and that the court therefore had a discretion to appoint either herself or appellant.

In *Estate of Barton*, 52 Cal. 538, it was held that where a decedent has left a will entitled to probate he did not die intestate within the meaning of section 1365 of the Code of Civil Procedure, and in such cases the granting of letters with the will an-

nexed is not limited to the order prescribed in said section. After this decision was rendered section 1350, *supra*, was amended by adding thereto the part of the provision above quoted in italics.

The result of this decision was, that cases arising where there was a valid will were not controlled by section 1365. Section 1350 at that time provided that in the cases enumerated therein letters must be issued, but omitted to provide how or to whom. The amendment supplied this omission by declaring that they must be issued "as designated and provided for the grant of letters in cases of intestacy."

Barton in his will did not name any person as executor, but his devisees applied for letters, as did also the public administrator. The lower court said: "If the appointment rested in the discretion of the court, the court would appoint Perdue & Rowland such administrators; but, in the opinion of the court, the public administrator is entitled to letters as a matter of right." This view of the law was held to be erroneous, and that the court was not limited to the order prescribed in section 1365. In other words, the power to appoint rested in its discretion.

Rosanna McDonald died four years after the death of decedent, without having applied for letters, and appellant urges that the case is thus brought within this amendment of section 1350.

Respondent suggests that there are at least three cases not provided for by section 1350, namely: 1. Where no executor has been appointed by the will; 2. Where the executor to whom letters have issued dies pending administration; 3. Where, as in this case, the executor dies before the will has been admitted to probate or letters have been issued; and that all these cases stand upon the same footing. It is urged that respondent did not "fail to apply, because failure involves neglect, inaction, or desertion, not attributable to a person who is dead."

It seems to us that the intention of the legislature is plainly manifest in the language used, and that the purpose was to make the provisions of section 1365 applicable in any case falling within the terms of section 1350. There was here a failure to apply for four years, followed by the death of the executrix named without any application made. If the question had aris-

en in the lifetime of the executrix—we will say after three years of neglect to appear and qualify or failure to apply—it may be that she could have satisfactorily explained her apparent laches and thus have defeated the counter application of the public administrator; a discretion might in such case rest with the court in deciding whether she had renounced her right to letters, subject to review for its abuse. (Code Civ. Proc., sec. 1301.) But here she did entirely “fail to apply for letters,” and to say that the statute does not embrace such a case is to interpolate in the section a proviso making it to read “or fail to apply for letters [during the lifetime of such executor or executors] letters . . . must be issued . . . as in cases of intestacy.” We must give effect to the statute as we find it; and, where the intent is given expression in plain and unambiguous language, the courts cannot add to or subtract from the act unless forced to do so in order to obviate impractical or absurd results.

It is our conclusion that the court erred in assuming that it was within its discretion to grant letters to the respondent. The fact that she offered to waive the commissions to which she would be entitled, in the interest of the estate, which was small, might be properly considered if the power to appoint were discretionary with the court, but, as it is not, no such consideration was competent or material in determining the question.

The order of the court should be reversed, with directions to grant the petition of the public administrator, and it is so recommended.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the order of the court is set aside, with directions to grant the petition of the public administrator.

Harrison, J., Van Fleet, J., Garoutte, J.

[L. A. No. 358. Department One.—September 15, 1897.]

JACOB RUDEL, Respondent, v. COUNTY OF LOS ANGELES et al., Appellants.

INJUNCTION—ACTS OF SUPERVISORS INCREASING FLOW OF WATERCOURSE—CHANGE OF CHANNEL OF ANOTHER WATERCOURSE—PROTECTION DISTRICT—FINDING OUTSIDE OF ISSUES.—An injunction will lie to restrain the supervisors of a county from changing the channel of a natural watercourse so as to increase the flow of water in another watercourse which is riparian to plaintiff's land, to the injury of his land and the improvements thereon; and where there is no attempt at justification in the answer, on account of the establishment of a protection district, not including plaintiff's land, for the benefit of which district the channel was changed, a finding in regard to such protection district is outside of the issues, and must be disregarded.

ID.—TRIAL OF ISSUES NOT MADE—ESTOPPEL—INSUFFICIENT RECORD—DISREGARD OF FINDING.—The rule that parties who have voluntarily tried issues not properly made are estopped from urging upon appeal that they were not made applies only where the record shows that the party against whom the estoppel is invoked consciously participated or acquiesced in the trial of the issue as if it had been made, or diverted his attention from the fact that it was not made, and from supplying or curing the defect in his pleading by amendment; and where the evidence is not brought up, and no facts are shown in the record from which an equitable estoppel can be inferred against the respondent, and it does not appear but that respondent may have objected to evidence outside of the issues, a finding of matter not included in the issues must be disregarded.

ID.—PRESUMPTION UPON APPEAL—ERROR NOT PRESUMED.—Presumption upon appeal may be made in favor of the regularity of judgments; but without an affirmative showing error cannot be presumed for the purpose of reversal.

ID.—CONSTITUTIONAL LAW—PRIVATE PROPERTY NOT TO BE DAMAGED FOR PUBLIC USE WITHOUT COMPENSATION—POWER OF LEGISLATURE.—Under section 14 of article I of the constitution, private property cannot be taken or damaged for public use without just compensation having been first made to or paid into court for the owner; and the legislature cannot authorize a public use, the natural result of which will be to deprive the owner of property of its beneficial use, without compensation to the party injured.

ID.—AUTHORITY OF SUPERVISORS OVER PROTECTION DISTRICTS.—The authority of the supervisors over protection districts, established under the act of March 27, 1895, to provide for their formation, is confined to the limits of the district, and does not extend to property situated outside thereof.

ID.—DRAINAGE—SERVIENT TENEMENT—NATURAL FLOW—ARTIFICIAL INCREASE OF FLOW.—The rule that land lower than that from which drainage comes to it is a servient tenement, and is subject to drainage from the

lands above, is confined to the natural flow of water descending upon it without artificial increase, and does not justify the upper proprietor in gathering and concentrating surface water from a large area in a single channel, and precipitating it in volume upon the servient tenement.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lucien Shaw, Judge.

The facts are stated in the opinion.

J. A. Donnell, and George M. Holton, for Appellants.

The owners of the higher tract have an easement for the flow of water over the lower tract. (*Gray v. McWilliams*, 98 Cal. 161; 35 Am. St. Rep. 163; *Ogburn v. Connor*, 46 Cal. 346; 13 Am. Rep. 213; *Los Angeles Cemetery Assn. v. Los Angeles*, 103 Cal. 466.) The supervisors acted under authority of law, and any resulting injury is *damnum absque injuria*. (*Lamb v. Reclamation Dist.*, 73 Cal. 125; 2 Am. St. Rep. 775.)

A. M. Stephens, and Wilson & Balla, for Respondent.

The finding as to the protection district is outside the issues, and must be disregarded. (*Marks v. Sayward*, 50 Cal. 57; *Yosemite Valley etc. Commrs. v. Bernard*, 98 Cal. 199; *Ortega v. Cordero*, 88 Cal. 221.) It is sufficient to sustain the injunction that material injury to plaintiff's land is reasonably probable. (*Nicholson v. Getchell*, 96 Cal. 394.) Plaintiff's property cannot be damaged without compensation. (Const., art. I, sec. 14.) More water than naturally flows upon plaintiff's land cannot be artificially precipitated upon it by defendants. (*Ogburn v. Connor*, 46 Cal. 346; 3 Am. Rep. 213; *Conniff v. San Francisco*, 67 Cal. 49; Washburn on Easements, 2d ed., 427; Gould on Waters, 169, 243, 249, 272; *Crawford v. Rambo*, 44 Ohio St. 279; *Byrne v. Minneapolis etc. Ry. Co.*, 38 Minn. 212; 8 Am. St. Rep. 668; *Burwell v. Hobson*, 12 Gratt. 322; 65 Am. Dec. 247; *O'Connell v. East Tennessee etc. Ry. Co.*, 87 Ga. 246; 27 Am. St. Rep. 246; 22 Am. & Eng. Ency. of Law, 927, 928.) An invasion of private rights by the discharge of water cannot be justified under legislative authority. (*Hooker v. New Haven etc. Co.*, 14 Conn. 146; 36 Am. Dec. 477; *Woodruff v. North Bloomfield Gravel Min. Co.*, 18 Fed. Rep. 753; *Pumpelly v. Green Bay etc. Co.*, 13 Wall.

166; *Arimond v. Green Bay etc. Co.*, 31 Wis. 316; *Rhodes v. Cleveland*, 10 Ohio, 159; 36 Am. Dec. 82; *Lackland v. North Missouri R. R. Co.*, 31 Mo. 180; *Tinsman v. Belvidere etc. R. R. Co.*, 26 N. J. L. 148; 69 Am. Dec. 565; *Rowe v. Portsmouth*, 56 N. H. 291; 22 Am. Rep. 464; *North Albany etc. R. R. Co. v. O'Daily*, 13 Ind. 353; *Cincinnati etc. Ry. Co. v. Cumminsville*, 14 Ohio St. 523; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Plum v. Morris Canal etc. Co.*, 10 N. J. Eq. 256; *Savannah v. Cleary*, 67 Ga. 153; *Little Rock etc. Ry. Co. v. Chapman*, 39 Ark. 463; 43 Am. Rep. 280; *McCombs v. Akron*, 15 Ohio, 474; *Payne v. Kansas City etc. R. R. Co.*, 112 Mo. 6; *McKenzie v. Mississippi etc. Boom Co.*, 29 Minn. 288.)

SEARLS, C.—This action was brought to restrain the defendants, who (except the defendant, H. Dovey, as to whom the appeal has been dismissed) are the duly elected, qualified, and acting supervisors of the county of Los Angeles, from diverting the waters of the Rubio cañon and causing the same to flow into and through Eaton cañon.

The cause was tried by the court without the intervention of a jury, and upon the findings in writing made, a decree was entered restraining the defendants as prayed for in the complaint.

Defendants appeal from the judgment, and the cause comes up on the judgment-roll, without a statement or bill of exceptions.

From the findings it appears that plaintiff is seised in fee and is in possession of that certain tract of land situate in the county of Los Angeles, state of California, particularly described as the west one-half of the southeast quarter of section seven (7) in township one (1) south, range eleven (11) west, San Bernardino meridian.

“The Eaton cañon is a cañon making out of the San Gabriel mountains, lying about four miles north of the above described land. That said cañon during the rainy season delivers a large volume of water upon the foothills and plains at the foot of said mountains, and from the foot of the said mountains said waters flow by a natural channel down to and upon the plaintiff's lands, entering the same by a natural channel at the northwest corner thereof, flowing through the same by said

natural channel to a point at the southeasterly corner thereof, and the said channel in each year when the rainfalls are abundant, is washed out and widened by the said waters flowing therein. Said channel is sufficient to carry the water naturally flowing in said channel during the rainy season, but is not sufficiently large to carry any additional water which should be turned into said Eaton cañon, or the stream leading therefrom, and is insufficient to carry the volume of water which will be turned into the said stream and added thereto by the acts of the defendants hereinafter set forth.

"Said channel so existing on the land of plaintiff is with difficulty controlled by the plaintiff, and any augmentation to the water therein flowing, in the manner as hereinafter proposed and threatened by the defendants, would render it impossible for plaintiff to control said channel and keep the waters within the bounds thereof. Plaintiff has buildings situated upon said tract of land near said channel, consisting of residence and winery, which would be endangered by the addition of any volume of water flowing in said channel; if any considerable volume of water be turned therein there would be very great danger of said residence and winery being washed out and destroyed."

"Should the defendants turn the water into the stream above the lands of the plaintiff, in the manner as hereinafter indicated, and as threatened by them, the said volume of water thus augmented would shift and change its channel from time to time, and would cause the water to flow over the plaintiff's land in various directions, and in a volume not naturally flowing therein, and would wash out and destroy a large portion of the vines on the banks of the said channel and along the lines of the new channel that would be made by the augmented water, and would spread over, overflow, and destroy the vineyard of the plaintiff existing at the mouth of and below the natural channel on his said lands, and would cause the plaintiff's lands to be greatly depreciated in value and irreparably injured.

"5. The Rubio cañon is a cañon flowing out of the said San Gabriel mountains, and distant about one mile west from the said Eaton cañon. The said Rubio cañon is a dry cañon at all seasons of the year, except during the rainy season and for a short

period thereafter, but during the rainy season a large volume of water flows down the said cañon and upon the mesa and plains at the foot of said cañon, and the waters, after passing from the cañon, flow naturally in a southerly direction across the plains toward Eaton cañon wash.

"6. During the month of August, 1895, the board of supervisors of this county, in pursuance of an act entitled 'An act to provide for the formation of protection districts in the various counties of this state, for the improvement and rectification of the channels of innavigable streams and watercourses, for the prevention or overflow thereof, by widening, deepening, and straightening, and otherwise improving the same, and to authorize the boards of supervisors to levy and collect assessments from the property benefited to pay the expenses of the same,' approved March 27, 1895 (Stats. 1895, p. 248), established 'Rubio Cañon Protection District,' and in pursuance of said act were, at the time of the commencement of this action, in the act of constructing a catch-basin about one mile below the point where Rubio cañon emerges from the mountains, and a ditch or canal running from said basin into the Eaton cañon wash and in a different channel than the natural channel of Rubio cañon, for the purpose of controlling and conducting the waters which, in times of heavy rains, flow down Rubio cañon and spread out upon the land at and below the mouth of the cañon and cause great damage to a large and highly improved section of country which forms said 'protection district,' which said canal or ditch would (if constructed) discharge its waters into the Eaton cañon wash at a point about three miles above the land of plaintiff; said point of discharge being no nearer the land of plaintiff than the natural point of discharge of said waters. Plaintiff's land is outside of the boundaries of said protection district.

"The waters from Rubio cañon naturally flow toward Eaton cañon wash, and whenever there is a sufficiently heavy rainfall, under natural conditions, a small portion of such water, if not interrupted or turned aside by artificial means, flows to and into said Eaton cañon wash several miles above plaintiff's land. Except during and immediately after extraordinary and unusually heavy rains the waters of Rubio cañon, owing to the porous nature of the soil over which it flows, and the broad surface over

which it spreads, under natural conditions, all sinks in the ground and none of it reaches Eaton cañon wash; and during and immediately after such rains almost all of it sinks in the ground, and only a very small portion of it reaches Eaton cañon wash.

"If the ditch proposed to be made by the defendants is made as proposed, it will carry substantially all the waters of the Rubio cañon away from its natural channel and into said Eaton cañon wash above plaintiff's land, and will materially increase the size of the stream in Eaton cañon wash as it flows over plaintiff's land above what would flow therein if said ditch is not made, and will thereby seriously injure plaintiff's land by destroying and washing away the soil thereof. The amount of such injury cannot be accurately ascertained nor estimated in advance."

It is proper to observe at the outset that, while the sixth finding of the court describes the defendants as having established "Rubio Cañon Protection District," under and pursuant to the act of March 27, 1895 (Stats. 1895, p. 248), etc., yet in the pleadings there was and is no justification under the protection district act; no issue was made, no defense interposed, upon that ground.

The sixth finding is, therefore, so far as it relates to the Rubio Cañon Protection District, outside of the pleadings and issues of the case.

The general rule is, that the finding of facts must be within the issues (*Devos v. Devos*, 51 Cal. 543), and if facts are found outside the issues they will not be regarded. (*Marks v. Sayward*, 50 Cal. 57.)

In *Commissioners v. Barnard*, 98 Cal. 199, the court below found that plaintiff executed a written lease to one Glasscock for a period of one year, etc., and appellant contended that under this finding the plaintiff was not entitled to the possession of the premises sought to be recovered. Harrison, J., speaking for the court, said, in alluding to the point: "The defendant did not, however, allege any defense of this nature in his answer, and there was no issue before the court which authorized it to make the finding, and, consequently, being a finding outside

the issues in the case, it could not form an element in determining the judgment to be rendered." (Citing *McCreary v. Marston*, 56 Cal. 403. See, also, *Hall v. Arnott*, 80 Cal. 348; *Gregory v. Nelson*, 41 Cal. 279; *Burnett v. Stearns*, 33 Cal. 469.) *Ortega v. Cordero*, 88 Cal. 221, is an instructive case on this point.

After discussing the general principle herein referred to, the class of cases in which the record shows the parties have voluntarily tried issues not involved in the pleadings, and are therefore estopped, is referred to, and the principle upon which the doctrine is based is pointed out and the conclusion reached that the application can only be made in cases where the record shows that the party against whom the estoppel is invoked consciously participated or acquiesced in the trial of the issue, as if it had been made, and in such manner as may have induced the other party to believe it had been made, or diverted his attention from the fact that it was not made, and from supplying or curing the defect in his pleading by amendment. (See *Riverside Water Co. v. Gage*, 108 Cal. 240.) The record here fails to show any facts from which an equitable estoppel can be inferred against the plaintiff. None of the evidence is brought up.

Non constat, but that if evidence was offered on the point, it was objected to by plaintiff and his objection overruled. As the judgment was in plaintiff's favor he had no cause for appeal, even if error was committed, of which he might have taken advantage had the decision been against him.

Courts sometimes indulge presumptions in favor of the regularity of judgments, but without an affirmative showing do not presume error for the purpose of reversal. We are of opinion the finding in reference to the protection district cannot be held to constitute a factor in the defense of appellant. If, however, the finding is utilized, we fail to see how it can avail the appellants.

The findings show that plaintiff's property is not within the protection district, and sections 5, 7, 9, 10, and 11 of the act show that the authority conferred by the statute is confined to the limits of the district. Were it otherwise, under section 14 of article I of our constitution "private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner."

The legislature cannot authorize a public use, the natural result of which will be to deprive the owners of property of its beneficial use, without allowing compensation to the party injured. (*Hooker v. New Haven etc. Co.*, 14 Conn. 146; 36 Am. Dec. 477.)

Appellants contend that the land of plaintiff, being lower than that sought to be drained by the acts of the defendants, becomes the servient tenement, and is subject to the drain from the lands above, and cites *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213, *McDaniel v. Cummings*, 83 Cal. 515, *Lamb v. Reclamation Dist.*, 73 Cal. 125, 2 Am. St. Rep. 775, *Gray v. McWilliams*, 98 Cal. 161, 35 Am. St. Rep. 163, and *Los Angeles Cemetery Assn. v. Los Angeles*, 103 Cal. 466, in support of their theory.

Ogburn v. Connor, *supra*, held in substance that where two parcels of land belonging to different owners are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass off over the lower tract, the owner of such upper tract of land has an easement to have the water flow over the land below, and the lower tract is charged with a corresponding servitude.

Here the plaintiff complains that the defendants have not allowed the laws of nature to dispose of the water through their chosen channel, but are about to construct an artificial channel by which the waters of a stream or cañon are diverted from their natural course and thrown into a new channel, whereby in greatly enhanced quantity it is to be cast upon him with every reasonable probability of involving his property, or a considerable and valuable portion thereof. *Gray v. McWilliams*, *supra*, and *Los Angeles Cemetery Assn. v. Los Angeles*, *supra*, reiterated this doctrine, and in the former case, after a review of the cases, it is said: "In the case of surface waters having no defined channels of escape, and the owner of the land upon which they are found being impotent to rid himself of their presence, the law wisely provides that the laws of nature shall be left untrammelled in their disposition."

We fail to see the analogy between those cases and the one at bar. The rule enunciated in the cases noticed did not go to the length of holding that the upper proprietor could gather and

concentrate surface water from a large area in a single channel and precipitate it in volume upon the servient tenement, but only that he was entitled to have it flow in its wonted manner without obstruction.

In the present case, the findings fail to show that the defendants are the proprietors of any dominant tenement, but only that the waters of Rubio cañon in times of flood discharge a large volume of water upon the plain below, to the injury of land-owners there situate, and that in cases of extreme flood a small portion of this water overflows and runs into the outlet of Eaton cañon above the land of plaintiff. By virtue of these facts, and to improve the lands injured below the mouth of Rubio cañon, defendants claim the right to turn all the water coming from Rubio cañon in times of flood into the stream flowing from Eaton cañon, to the destruction of plaintiff's property.

The very statement of this proposition demonstrates its illegality. The findings establish a case entitling plaintiff to an injunction under the provision of subdivision 2 of section 526 of the Code of Civil Procedure, and bring the case within the scope of the general rules under which courts of equity restrain the doing of wrongful acts which necessarily eventuate in irreparable injury to others.

We recommend that the judgment be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Harrison, J., Van Fleet, J., Garoutte, J.

[S. F. No. 825. Department One.—September 15, 1897.]

In the Matter of the Estate of MARTINA CASTRO DE-
PEAUX, Deceased.

ESTATES OF DECEASED PERSONS—ORDER REFUSING LETTERS OF ADMINISTRATION—IMPLIED FINDING—INSUFFICIENT BILL OF EXCEPTIONS—APPEAL—EVIDENCE NOT REVIEWABLE.—Where an order refusing letters of administration of the estate of a deceased person is in general terms, it implies a finding against the petitioner upon all the material allegations of the petition; and if there is no specification of insufficiency of the evidence to justify the decision, the appellate court is precluded from looking into the evidence to ascertain its sufficiency to sustain the order.

APPEAL from an order of the Superior Court of Santa Cruz County refusing letters of administration. J. H. Logan, Judge.

The facts are stated in the opinion of the court.

J. F. Utter, A. H. Cohen, and J. J. Scrivner, for Appellant.

William T. Jeter, and Charles B. Younger, for Respondents.

VAN FLEET, J.—Appeal from an order refusing a grant of letters of administration upon the estate of deceased to appellant.

The record presented by appellant does not enable us to review the order of the court below in denying the application for letters. The order is general in terms, implying a finding against petitioner upon all the material allegations of the petition, and there is in the bill of exceptions no specification of insufficiency of the evidence to justify the decision. We are therefore precluded from looking into the evidence to ascertain its sufficiency to sustain the order. (*Winterburn v. Chambers*, 91 Cal. 170, 185.)

Order affirmed.

Harrison, J., and Garoutte, J., concurred.

[Crim. No. 284. Department Two.—September 15, 1897.]

THE PEOPLE, Respondent, v. L. J. LAIRD, Jr., Appellant.

CRIMINAL LAW—FORGERY—UTTERING FALSE CHECK—PROOF OF OFFENSE—PERSONS BEARING FORGED NAME—CHECK NOT FICTITIOUS.—Where the defendant was proved to have passed a false check upon a storekeeper as genuine, with intent to defraud, and it appeared that there were two persons in the county bearing the name which was falsely signed to the check, and that one of them resided in the city where the check purported to be made and was passed, and that neither of them authorized the defendant to sign his name to the check, the defendant was properly convicted of forgery, and it cannot be claimed that the check was fictitious.

ID.—EVIDENCE—EXISTENCE OF PERSONS WITH FORGED NAME—CITY DIRECTORY—GREAT REGISTER.—It is competent to resort to the city directory and to the great register of the county to determine whether there was or was not a person in the city or county bearing the name which was signed to a false check passed by the defendant, and, if the name of such person is found therein, to show his residence.

APPEAL from a judgment of the Superior Court of Los Angeles County. and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

J. Vincent Hannon, Blakely & Barber, William T. Blakely, and J. Walter Barber, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

CHIPMAN, C.—Defendant was convicted of the crime of forgery, and was sentenced to imprisonment for one year at San Quentin. The appeal is from the judgment and from an order denying motion for new trial. The alleged forgery was of the following check:

Los Angeles, Cal., April 30, 1896.

"No. 174. California Bank. Pay to the order of L. J. Laird, Jr., \$26.00 (twenty-six 00-100 dollars). A. B. CLARK."

Defendant bought a bill of goods from Cline Brothers, in Los Angeles, amounting to about four dollars, and presented this check in payment, and was paid the difference in money; he

gave a certain number and street to which the goods were to be sent; no such number could be found, the place indicated being an unimproved part of the city, and the goods were returned to the store. At the time he presented the check defendant stated to one of the witnesses that "he got the check from a man in Pasadena; he said he had been working for Mr. Clark in Pasadena." Another witness testified as follows: "I asked him where he got the check, and he said he got it from a party in Pasadena whom he had worked for. He said that he received it from a party in Pasadena in payment for some work." It was shown at the trial that no person of the name of A. B. Clark had an account at the California Bank, or any money there to his credit. One Abbott B. Clark, who gave his residence as 525 West Fifth street, Los Angeles, testified that he had resided there several years, and that he had not signed the check, or authorized anyone to sign it. One A. B. Clark, who gave his residence as Hollywood, testified that he did not sign the check, or authorize it to be signed. A police officer of Los Angeles testified that he had searched the great register of the county and the city directory, and found there were two A. B. Clarks in the county—one at Hollywood, and one on Fifth street, Los Angeles—the same who testified; that he could find no others. There was no evidence as to any inquiry being made at Pasadena to find any person of the name of A. B. Clark except by the search of the great register of the county. No witnesses were called on behalf of defendant. At the close of the people's evidence the defendant moved that the court instruct the jury to acquit, on the ground that the testimony was not sufficient to prove the offense charged; and defendant's only contention here is that the evidence did not justify the verdict.

The information is laid under section 470 of the Penal Code. So far as it relates to the offense charged, the section reads as follows: "Every person who, with intent to defraud another, falsely makes any check ; or utters or passes as true and genuine any of the above-named false, altered, or forged matters knowing the same to be false, altered, or forged, with intent to prejudice or defraud any person is guilty of forgery."

It was said in *People v. Elliott*, 90 Cal. 586: "Where a note, bill, check, etc., is the subject of a forgery, it must be proven that the instrument was not signed by the person by whom it purports to be signed, or that such person did not exist at the time, or, in other words, is a fictitious person. . . . The law appears to recognize a distinction between forged instruments purporting to have the signature of a person in existence, and those where the signature is purely and entirely fictitious.

Defendant, relying upon the case just cited, claims that "at best the prosecution proved no more than the crime of 'obtaining money under false pretenses,' or the crime of 'passing a fictitious check.'" Assuming that, when he presented the check, he stated that he had been working for "A. B. Clark of Pasadena," and "that he had received the check from A. B. Clark of Pasadena," defendant proceeds to argue that the words "of Pasadena" were words of limitation as to the identity of the person signing the check; that the person receiving it would do so supposing it to be the check of "A. B. Clark of Pasadena," and that therefore proof by some one of that name residing in Los Angeles or Hollywood would not be proof that "A. B. Clark of Pasadena" had not signed or authorized the signing; and the prosecution must necessarily fail.

Defendant does not correctly state the evidence; it does not show that defendant informed Cline Brothers that "he had been working for A. B. Clark of Pasadena," nor does it show that he represented "that he had received the check from A. B. Clark of Pasadena." He said he had received it from a party in Pasadena in payment for work; a party whom he had worked for; that he had been working for a Mr. Clark; but the evidence fails to show that this Mr. Clark was the same person as A. B. Clark whose name is signed to the check, and it fails to show that he received the check from any person of that name; he may have worked for other persons than Mr. Clark; the statement was that he received the check from a party for whom he worked, and this may have been an entirely different person from Clark. It does not follow from any of the evidence that the A. B. Clark who purports to have signed the check did not reside at Los Angeles, where it purports to have been made.

It was competent to resort to the city directory and to the

great register of the county to prove that there was no such person as A. B. Clark (*People v. Eppinger*, 105 Cal. 36); and I see no reason why resort may not be had to this source of information to show that there was such person, and his residence. The check purported to have been drawn in Los Angeles, and on a bank in Los Angeles. The city directory showed only one man of the name of A. B. Clark, and the great register showed but two in the county—one in Los Angeles, and one at Hollywood—both of whom were witnesses, and testified that they did not sign the check, or authorize it to be signed. A bookkeeper of the California Bank testified that there was no money on deposit there to the credit of A. B. Clark when the check was drawn. It was said in *People v. Eppinger, supra*, that “the essence of the offense created by the provisions of section 476 is the making, with an intent to defraud another, of an obligation of some ‘bank, corporation, copartnership, or individual,’ when in fact there is no such obligor in existence.” There were, as it seems, two A. B. Clarks in the county—one where the check was drawn, and one in a neighboring place—and it cannot therefore be claimed that the check was fictitious.

Defendant presents no other point in his brief, and as this one is without merit the verdict should stand. It is recommended that the judgment of conviction be affirmed.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment of conviction is affirmed.

McFarland, J., Henshaw, J., Temple, J.

Hearing in Bank denied.

[L. A. No. 313. Department Two.—September 15, 1897.]

CITY OF LOS ANGELES et al., Respondents, v. WILLIAM YOUNG, Justice of the Peace of Los Angeles Township, Appellant

CERTIORARI—JUSTICE'S JUDGMENT—DEFAULT—DEMURRER—NOTICE OF HEARING—RECORD PROOF OF SERVICE—SUPPLEMENTAL EVIDENCE OF CONSTABLE—DISPROOF OF RECORD BY ATTORNEY INADMISSIBLE.—Where a judgment was rendered by default in a justices' court after an appearance and filing of a demurrer by an attorney for the defendant, and the overruling of the same, and the expiration of time to answer thereafter, and the docket showed that notice of hearing of the demurrer was issued three days before the hearing, and was returned and filed on that day, bearing an indorsement of receipt of a copy of the notice with blank date, purporting to be signed by the attorney for the defendant, followed by the memorandum "Served H. H. Y.," upon certiorari to review the judgment, though it may be proper to admit proof supplemental to the record to show that the memorandum bore the initials of the constable who served the notice, and that two days before the hearing he delivered the copy of the notice to a man in the office of defendant's attorney, who signed the attorney's name to the acknowledgment of service, yet evidence of such attorney is not admissible to impeach the record of service, by disproving the authority of the person in his office to make the acknowledgment, and denying that he in fact received notice of the hearing.

ID.—REVIEW OF FACTS UPON CERTIORARI—EVIDENCE—PROVINCE OF WRIT—TRIAL OF FACTS DE NOVO NOT PERMITTED.—Upon certiorari, if it becomes necessary for the court of review to be put in possession of the facts upon which the court below acted, and which are not technically of record, it is competent for that court to require the lower court to certify such facts in its return to the writ, and its statement of facts is part of the record, and it seems that upon this principle the court of review may hear evidence supplemental to the record, in aid of the jurisdiction appearing from the record; but the province of the writ being to review the record of an inferior court, board, or tribunal, and to determine therefrom whether it has exceeded its jurisdiction, its inquiry into the evidence is limited to that upon which the inferior tribunal acted; and where its jurisdiction depended upon a question of fact, that question cannot be tried de novo upon its merits, nor can evidence *dehors* the record and contradicting it, to show want of jurisdiction, ever be permitted.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

W. P. Hyatt, for Appellant.

W. E. Dunn, for Respondents.

HENSHAW, J.—This is an appeal from the judgment of the superior court upon a writ of review vacating and annulling a judgment rendered in a justice's court.

One McCombs in the justice's court of the township of Los Angeles had instituted a suit against the city of Los Angeles and C. Compton. The defendants appeared in said action by their attorney W. E. Dunn, and interposed demurrers to the complaint. Thereafter the justice of the peace heard and passed upon the demurrers, overruled them, and granted defendants two days' time in which to answer. Defendants failed to answer, and judgment by default was entered for plaintiff. The statutory period of thirty days during which an appeal could have been taken to the superior court passed, and afterward the defendants in that action obtained from the superior court of the county a writ of review. After hearing upon this writ the superior court annulled the judgment of the justice's court, and this appeal followed.

The contention of petitioners in the superior court was that neither they nor their attorney had been served with notice of the time set for the trial; that service of such notice upon them is, under section 850 of the Code of Civil Procedure, an imperative prerequisite to the jurisdiction of the justice of the peace to try the cause; and that under the writ they were entitled to show and did show to the satisfaction of the superior court, by legal and competent evidence, that no notice had in fact been served.

Respondents' contention that the service of notice of the time set for trial is a jurisdictional prerequisite is supported by the case of *Jones v. Justice's Court*, 97 Cal. 523. As appears by that case, the entry in the justice's docket was to the effect merely that at the time set for trial no one appeared for defendant, and that counsel for the adverse party "stated that notice of trial had been served on counsel for defendant, and that he would produce the same." This was manifestly no proof of service of the notice, and it was so held by this court. There was also an affidavit of the service of the notice filed in that case, but this affidavit was not embodied in the return of the justice to the superior court, and this court further held in that regard that the superior court was not required to accept the above

memorandum in the justice's docket as any evidence that the affidavit contained proof that the notice had been given, it being further said: "The return did not, moreover, purport to show that the justice had given any notice, nor did it contain or refer to the service of any notice given by him, and as all notices are required to be in writing (Code Civ. Proc., sec. 1010), such notice, if it had existed, would have formed a part of the return by the justice."

The case at bar differs in essential particulars from that of *Jones v. Justice's Court*, *supra*. Here the justice returned, as by the writ he was commanded to do: 1. A transcript of his docket entries, by which it appeared that on May 22d notice was issued, and upon May 25th notice was returned and filed; and 2. The papers and files in the case, amongst which is a written notice of the date set for the hearing of demurrer, addressed to W. E. Dunn, attorney for defendants, dated May 22d, and notifying defendants' attorney that the demurrer had been set for hearing upon the twenty-fifth day of May, 1896, at 1.30 o'clock P. M. This notice bears the indorsement:

"Received copy of the within notice, ———, 1896.

W. E. DUNN,

"Attorneys for Defendant.

"Served H. H. Y."

Upon the hearing it was permitted to be shown that H. H. Y. are the initials of H. H. Yonken, a constable, and that he served the notice in question upon the twenty-third day of May, 1896, by leaving a copy thereof with a man in the office of W. E. Dunn, which man acknowledged service of the notice as above set forth in the name of Dunn. This testimony, introduced by petitioners, was followed under objection of appellants by the testimony of the attorney, Dunn, who swore that he did not know who signed his name to the notice; that it was not signed by anyone authorized so to do; and that in fact he had never received notice of the time set for the hearing of the demurrer.

Upon certiorari, if it becomes necessary for the court of review to be put in possession of the facts upon which the court below acted, and which are not technically of record, it is competent for that court to require the lower court to certify such facts in its return to the writ, and this statement of facts would

then be a part of the record. (2 Spelling on Extraordinary Relief, sec. 2020.) Under this principle it was not, perhaps, improper for the trial court to admit the evidence of Yonken, not as contradicting the record of the justice, but as supplemental thereto. (*People ex rel. Whitney v. San Francisco Fire Dept.*, 14 Cal. 479.)

But it may be set down as a universal rule that, as the province of the writ of certiorari is to review a record of an inferior court, board, or tribunal, and to determine from the record whether such court, board, or tribunal has exceeded its jurisdiction, evidence *dehors* the record, and contradicting it, is never permitted. The common-law writ of *certiorari* tried nothing but the jurisdiction, and incidentally the regularity of the proceedings upon which the jurisdiction depends. In many cases, therefore, under such writs, the evidence upon which the court acted in determining its jurisdiction was made a part of the record and reviewed under the writ, but the inquiry was always limited to the evidence before the tribunal whose determination was under review. If the jurisdiction of the inferior tribunal depended upon a question of fact, that fact was never tried *de novo* upon its merits, but the inquiry thereupon was limited strictly to the evidence upon which the inferior tribunal acted. (*People ex rel. Whitney v. San Francisco Fire Dept.*, *supra*.)

In this essential feature, then, as above suggested, does this case differ from the case of *Jones v. Justice's Court*, *supra*. In that case the court, limiting its inquiry to the return, found there had been no service of notice of the time set for trial. In this case the court reaches its conclusion by admitting and considering the parol testimony of the attorney, Dunn, to impeach and contradict the record of the justice which in itself was legally sufficient to show jurisdiction. This may not be done. The evidence of Dunn should not have been admitted.

Therefore, the judgment is reversed and the cause remanded.

Temple, J., and McFarland, J., concurred.

[L. A. No. 136. In Bank.—September 15, 1897.]

ALICE W. ROBINSON, Appellant, v. EDWARD DOUGHERTY, Respondent.

HOMESTEAD—COMMUNITY PROPERTY—SURVIVORSHIP—CHILDLESS WIDOWER—

EXTENT OF EXEMPTION—PRE-EXISTING DEBTS.—Where a homestead declared by a husband upon community property vested in him as survivor upon the death of his wife, notwithstanding the fact that he was left a childless widower, and ceased to be the head of a family, the extent of the homestead exemption of five thousand dollars continues in his favor as to all pre-existing debts contracted before the death of the wife, and during the existence of the homestead.

APPEAL from an order of the Superior Court of San Diego County declaring the amount of a homestead exemption and refusing to order a sale under execution. W. L. Pierce, Judge.

The facts are stated in the opinion of the court.

L. L. Boone, and Gibson & Titus, for Appellant.

One who is not the head of a family can claim no greater exemption than one thousand dollars. (Civ. Code, sec. 1260.) The present time of the appraisalment is the time when the value of the homestead is to be compared with the amount of the then existing exemption. (Civ. Code, sec. 1246.) The object of the homestead law is to protect the home of the family. (*Gregg v. Bostwick*, 33 Cal. 220; 91 Am. Dec. 637; *Tyrrell v. Baldwin*, 78 Cal. 475); and when the reason for the rule ceases so should the rule itself cease. (Civ. Code, sec. 8510; *Roth v. Insley*, 86 Cal. 134, 141; *Revalk v. Kraemer*, 8 Cal. 66; 68 Am. Dec. 304.)

J. B. Mannix, for Appellant.

A homestead once acquired by the head of a family is not lost by the death or absence of his wife and children, if he continues to occupy it. (*Beckmann v. Meyer*, 75 Mo. 333, 335-6; *Blum v. Gaines*, 57 Tex. 123; *Kessler v. Draub*, 52 Tex. 575; 36 Am. Rep. 727; *Wood v. Wheeler*, 7 Tex. 13; *Webb v. Cowley*, 5 Lea, 722; *Stanley v. Snyder*, 43 Ark. 429; *Rollings v. Evans*, 23 S. C. 316; *Blackwell v. Broughton*, 56 Ga. 390; *Wilkinson v. Merrill*, 87 Va. 513; *Barney v. Leeds*, 51 N. H. 253; *Towne v.*

Rumsey (Wy., March 14, 1894), 35 Pac. Rep. 1025; *Roberts v. Greer*, 22 Nev. 318; 58 Am. St. Rep. ; *Stults v. Sale*, 92 Ky. 5; 36 Am. St. Rep. 575.)

THE COURT.—This is an appeal from an order made after final judgment, and arises upon the following facts: Edward Dougherty, the defendant, was the head of a family consisting of himself and his wife. While thus the head of a family he declared a homestead upon community property. This homestead continued, and upon the death of his wife in 1893 it vested in him. (Civ. Code, sec. 1265; Code Civ. Proc., sec. 1474.) Defendant upon the death of his wife was left a childless widower. Plaintiff and appellant is a judgment creditor of respondent, the judgment being a personal judgment for a deficiency remaining after sale of mortgaged premises. The debt was contracted by the husband after the declaration of homestead, and the mortgage did not affect the homestead property. Appellant, by proceedings had under title V, chapter I, of the Civil Code, asked for an appraisal of the homestead, and sought to subject the excess in value of the homestead over one thousand dollars to the payment of her judgment, upon the theory that the husband by the death of his wife, leaving him childless, ceased to be the head of a family, and that, while the homestead property vested in him, the exemption to such a surviving husband was only one thousand dollars. Appraisers were appointed who reported the value of the property to be five thousand dollars. The trial court held that respondent's homestead exemption was in the sum of five thousand dollars, and refused to order the sale. Thereupon plaintiff prosecutes this appeal.

Under this statement of facts it is to be noted that we are called upon to consider merely the nature of the homestead exemption, when the debt which is sought to be enforced against it was created during the existence of the homestead. The rights of a creditor to proceed against that property for a debt afterward created, and the nature and extent of the exemption for such after-created debt, are not questions here calling for consideration, and, consequently, are questions not decided. The single legal proposition presented is this: Is the homestead

exemption of a childless surviving spouse five thousand dollars or one thousand dollars, in a case where the debt sought to be enforced was contracted during the existence of the community and of the homestead, and where the homestead itself was declared during coverture upon community property?

This question was correctly answered by the decision of the trial court. As to such pre-existing debts the exemption of the homestead is the same as it was during the continuance of the community. Thus in *Sanders v. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26, it is said by this court in Bank, dealing with a like attempt to subject the homestead to the payment of such a debt: "James Lansing died, when the premises became the sole property of Mary W. Lansing (his widow) by operation of law, and was protected as such to the survivor in the same manner as before it had been protected to the community by its homestead character." In *Roth v. Insley*, 86 Cal. 134, the facts were that a son had declared a homestead, claiming to be the head of the family by virtue of the fact that his mother resided with him on the property. The mother died, and an effort was made to subject the property to the payment of a debt upon the ground that the son had ceased to be the head of a family, and that the homestead characteristics theretofore impressed upon the property had passed with her death. It was again held by this court in Bank that, under section 1265 of the Civil Code, as amended in 1880, the homestead set apart under section 1261, subdivision 6, of the Civil Code, did not by the death of the mother cease to be exempt from execution for a debt of the son because he had ceased to be the head of the family. In *Dickey v. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321, it is said, referring to section 1265 of the Civil Code: "As will be observed from the foregoing section, upon the death of either spouse a homestead declared upon the community property vests absolutely in the survivor. In the hands of such survivor it is protected against enforced sale precisely as before it had been protected to the community by its homestead character."

The order appealed from is affirmed.

Beatty, C. J., did not participate in the foregoing decision.

[Sec. No. 445. In Bank.—September 17, 1897.]

J. J. MCKINNON, Respondent, v. CHARLES E. LEONARD, et al., composing Board of Trustees and ex officio Board of Election Commissioners of Sacramento, Appellants.

ELECTIONS—ACT OF MARCH 13, 1897.—The act of March 13, 1897, providing for general primary elections, does not apply to municipal elections to be held in the year 1897, for the reason that by its terms the machinery provided for the holding of such primary elections is not to be set in operation until January, 1898, when under section 5 the election commissioners are to select the names of those electors who are to act as officers of the primary election boards.

APPEAL from a judgment of the Superior Court of Sacramento County. Joseph W. Hughes, Judge.

The facts are stated in the opinion of the court.

Robert T. & William H. Devlin, for Appellants.

L. T. Hatfield, for Respondent.

THE COURT.—Action in mandate to compel the trustees of the city of Sacramento, as the election commission of that city, to proceed under the provisions of an act of the legislature of March 13, 1897, providing for general primary elections, etc. (Stats. 1897, p. 115), to hold a primary election for the selection of delegates to conventions of the various political parties which shall select candidates for the municipal officers to be voted for at the ensuing city election. The mandate was awarded, and the trustees appeal.

The urgency of the case demands an immediate decision, and this prevents a detailed consideration of the questions presented. However, upon the principal proposition argued, one which is determinative of this appeal, we are of opinion that the act does not apply to municipal elections to be held in the current year, for the reason that by its terms the machinery provided for the holding of such primary elections is not to be set in operation until the month of January, 1898, when, under section 5, the election commissioners are to select the names of those electors who are to act as officers of the primary election boards. No other section of the act to which our attention has been directed makes different provision as to cities.

For the purposes of this case, therefore, no other question need be considered, and no other is determined.

The judgment is reversed, with directions to the trial court to enter judgment for the trustees.

[Sac. Nos. 92, 181, 214. In Bank.—September 17, 1897.]

TULARE COUNTY, Appellant, v. E. A. MAY, et al., Respondents. TULARE COUNTY, Appellant, v. E. M. JEFFERDS, et al., Respondents. GUY GILMER, et al., Respondents, v. E. M. JEFFERDS, Defendant. TULARE COUNTY, Intervenor, Appellant.

COUNTIES—PUBLIC OFFICERS—SALARIES OF DEPUTIES—CONSTITUTIONAL LAW—

ACT OF 1893.—The provisions of section 173 of the County Government Act of 1893 (Stats. 1893, pp. 415, 416), empowering certain of the county officers in counties of the eleventh class to appoint a specified number of deputies, whose salaries are fixed by the act and made payable out of the county treasury, are not in conflict with section 11 of article I of the constitution, requiring all laws of a general nature to have a uniform operation, notwithstanding other provisions of the act, affecting counties of different classes. require the salaries of such deputies to be paid by their principals out of the gross sum allowed them for their compensation; nor with the various subdivisions of section 25 of article IV, forbidding the legislature to pass local or special laws in the cases enumerated therein; nor with the provisions of sections 4 and 5 of article XI, requiring the establishment of county governments, and the election or appointment of county officers, to be by general and uniform laws; nor with section 13 of the same article, prohibiting the legislature from delegating the power to make, control, appropriate, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects; nor with section 9 of article XI, forbidding any increase of compensation after election of public officers.

1D.—DEPUTY ASSESSORS.—The provisions of subdivision 21 of section 173 of such act, authorizing the assessor in counties of the eleventh class to appoint a number of deputies during the months of March, April, May, and June, at a salary of five dollars per diem, but not expressly providing for their payment by the county, should be construed as authorizing their payment out of the county treasury, in view of the provisions of section 216 of the act, as a contrary construction would necessitate the payment thereof by the assessor, out of his salary, which is fixed by the act at an amount which is entirely insufficient for such purpose.

ID.—CREATION OF ADDITIONAL JUDGESHIP.—The provisions of section 216 of the act, authorizing the appointment of one additional deputy sheriff and two additional deputy clerks in any county in which an additional judge of the superior court is provided for, is general and uniform in its operation, and applies to the whole state, and takes effect in any county whenever an additional judgeship is created therein. Such provisions are constitutional.

APPEALS from judgments of the Superior Court of Tulare County. J. R. Webb, Judge.

The facts are stated in the opinion of the court.

Lamberson & Middlecoff, and Power & Alford, for Appellant, Tulare County.

E. O. Larkins, for Appellant Jefferda.

W. B. Wallace, for Respondents.

BEATTY, C. J.—These three appeals involve one and the same principal question, viz., the constitutionality of certain provisions of the County Government Act of 1893 relating to the appointment and salaries of various deputy officers in counties of the eleventh class, in which Tulare county stands alone. The first is from a judgment dismissing a suit to enjoin the county treasurer from paying the salaries in question; the second is from a similar judgment in a suit to enjoin the county auditor from drawing salary warrants; and the third is from a judgment awarding a peremptory writ of mandate to the auditor to draw his warrants for such salaries. If the provisions referred to are constitutional, the judgments should all be affirmed; if unconstitutional, the judgments must all be reversed.

The provisions of the act governing the compensation of officers of counties of the eleventh class (Tulare county) are to be found on pages 415 and 416 of the Statutes of 1893, and are as follows:

“Sec. 173. In counties of the eleventh class the county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries, to wit: 1. The county clerk, three thousand dollars per annum; 2. The sheriff, eight thousand five hundred dollars per annum, and mileage for the service of any and all process required by law to be served by him, at the rate of ten cents per

mile for every mile necessarily traveled in the performance of such duty; 3. The recorder, two thousand dollars per annum, and six cents per folio for every instrument of any character transcribed by him or his deputies, which said amounts shall be paid out of the county treasury; 4. The auditor, two thousand dollars per annum; 5. The treasurer two thousand dollars per annum; 6. The tax collector, five thousand dollars per annum; 7. The assessor, eighteen hundred dollars per annum; 8. The district attorney, two thousand four hundred dollars per annum; . . . 11. The superintendent of schools, one thousand eight hundred dollars per annum; . . . 17. The county clerk may appoint three deputies, who shall receive from the county a salary of one thousand and twenty dollars per annum each; 18. The district attorney may appoint one deputy, who shall receive from the county a salary of fifteen hundred dollars per annum; also, one deputy, who shall receive from the county a salary of twelve hundred dollars per annum; 19. The recorder may appoint one deputy, who shall receive from the county a salary of twelve hundred dollars per annum; 20. The superintendent of schools may appoint one deputy, who shall receive from the county a salary of one thousand and twenty dollars per annum; 21. The assessor may appoint fourteen deputies for the months of March, April, and May, at a salary of five dollars per day. He may also appoint six deputies for the month of June, at a salary of five dollars per day."

It is contended by the appellant that all of the above quoted provisions empowering the sheriff, district attorney, clerk, etc., to appoint deputies, and requiring the payment of their salaries out of the county treasury, are void because in conflict with the various clauses of the Constitution:

1. It is claimed they are in conflict with section 11 of article I, which provides that "all laws of a general nature shall have a uniform operation," the position of counsel being that the County Government Act of 1893 is a general law "prescribing the powers and duties of officers in counties (Const., art. IV, sec. 25, subd. 28), and that its uniform operation is destroyed by the exceptional privilege conferred upon the officers of fourteen classes, including the eleventh class, of appointing deputies whose salaries are to be paid out of the county treasury, while

in the remaining thirty-eight classes all deputies are to be paid by their principals out of the gross sum allowed for their compensation.

Upon the same grounds it is contended that these provisions of the County Government Act are in conflict with various subdivisions of section 25, article IV, forbidding the legislature to pass local or special laws in any of the following enumerated cases: "9. Regulating county and township business, or the election of county and township officers." 19. Granting to any corporation, association or individual any special or exclusive right, privilege or immunity." "28. Creating offices or prescribing the powers and duties of officers in counties, cities, cities and counties, townships, election or school districts." "29. Affecting the fees or salary of any officer." "33. In all other cases where a general law can be made applicable."

To sustain his position counsel for appellant cites a number of decisions of this court, but I think none of them are in point except *Welsh v. Bramlett*, 98 Cal. 219, and *Walser v. Austin*, 104 Cal. 128.

In the case of *Welsh v. Bramlett*, *supra*, I concurred in the decision and in the opinion of Justice Harrison, but I did not at the time place the construction upon that part of the opinion commencing at page 234 which upon a more careful reading I can see that it bears, and upon which it was followed by Department Two in *Walser v. Austin*, *supra*. The case of *Welsh v. Bramlett*, *supra*, was correctly decided upon the first ground discussed in the opinion of Justice Harrison—that is to say, upon the ground so fully and carefully considered in *Dougherty v. Austin*, 94 Cal. 601. This being so, the proposition discussed under the second head of Justice Harrison's opinion was unnecessary to the decision and for that reason no doubt received less consideration than its importance demanded. In *Walser v. Austin*, *supra*, the Department simply followed the decision of the full court in *Welsh v. Bramlett*, *supra*. There was no petition for a rehearing of that case, and the proposition involved has never received any further consideration by the full court, or either department of the court, than was given to it in *Welsh v. Bramlett*, *supra*, where, as I have said, its decision was not necessary. In the case of *Farnum v. Warner*, 104 Cal. 677.

also decided in Department, after the decision of *Walser v. Austin, supra*, the statute in question presented the same supposed infirmity that was held fatal in *Walser v. Austin, supra*, but it was held to be a valid enactment. In this case also there was no request for a rehearing in Bank, and no reconsideration of the matter by the full court. The result is, that the point here involved has never received the serious attention which it deserves in view of the consequences involved in its determination, and being convinced, upon a fuller examination of the subject, that the opinion expressed in *Welsh v. Bramlett, supra*, was erroneous, and that no harm or confusion can now result from a correction of the error, I shall state my reasons for concluding that the provisions of the act of 1893 here in question are not in conflict with the above cited clauses of the constitution.

To allow county officers to appoint deputies whose fixed salaries are to be paid out of the county treasury is, of course, unobjectionable so far as the mere power to appoint deputies is concerned, for by section 61 (Stats. 1893, p. 367) these same officers are authorized to appoint as many deputies as a prompt discharge of the duties of their respective offices may require, and this general authorization embraces all of the special authority conferred by the clauses of section 173 above quoted. That is to say, these officers may, under section 61, appoint the same deputies that they are allowed to appoint under section 173, and they are not obliged under either section to appoint any more deputies than a prompt discharge of the duties of the office may require. These sections do not destroy the uniformity of the law, nor do they introduce any special regulation in counties of the eleventh class. So far as the power to appoint deputies is concerned the rule is general and uniform throughout the state, and that rule is that such county officers as are allowed to act by deputy may everywhere appoint as many deputies as a prompt discharge of their official duties demands. But this, as I am fully aware, does not meet the objection of appellant, which is that in this instance the officers are allowed to appoint deputies whose salaries are to be paid out of the county treasury. This objection would be more serious, it seems to me, if the law contemplated the payment of salaries of deputies from any other source. But it does not.

There are two rules for the compensation of deputies in the different counties of the state. In most of the classes a lump sum is allowed to the principal, out of which he is required to pay his deputies; in a smaller number of classes—including the eleventh—the principal is allowed a fixed salary, and certain deputies are allowed fixed salaries, but in both cases the salaries of all are by the express terms of the statute, to be paid out of the county treasury. The whole question, therefore, resolves itself into this: Can the legislature establish one rule of compensation of deputies in one class of counties, and a different rule in another class of counties? I can see no constitutional objection to such an exercise of power. Under either rule a compensation proportionate to duties may be secured; and for the purpose of securing such compensation a division of counties into classes is expressly authorized, and, when a statute or a provision of a statute has no other object or effect than to regulate compensation of officers, the provision or statute is uniform and general if it applies equally to all the counties of any class, no matter which of the two rules above referred to is followed.

2. What has been said is also a sufficient answer to the contention that the provisions of section 173 are in conflict with sections 4 and 5 of article XI of the constitution.

3. Section 13 of the same article is as follows:

“Sec. 13. The legislature shall not delegate to any special commission, private corporation, company, association, or individual any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever.” The objection that the provisions of section 173 of the act are in conflict with this clause of the constitution is based upon the contention that they give the designated officers the power to control and appropriate county revenues. I see no force in this objection. These officers do not control or appropriate any county money—they are merely vested with a discretionary power to incur expenses within a fixed maximum, which expenses, when incurred, become a county charge. Such a discretionary power is frequently reposed in public officers by general laws, and since the power

conferred in this case is only for the purpose of regulating official salaries, the law is a general law because it applies to all counties of the class which the legislature is empowered to make for the purpose of regulating official salaries.

4. The provisions of section 173 are not in conflict with section 9 of article XI, which forbids any increase of compensation after election of public officers. They have no such effect.

This disposes of all questions arising upon section 173 of the statute, except those relating to salaries of deputy assessors. By subdivision 21 above quoted it will be seen that the assessor is authorized to appoint a number of deputies during the months of March, April, May, and June, at a salary of five dollars per diem, but it is not expressly provided that they shall be paid by the county. By section 216 it is enacted that "the salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or ex officio officers, their deputies and assistants, unless in this act otherwise provided." It is contended that the salaries of the deputy assessors cannot be paid out of the county treasury, because the rule is that all deputies must be paid out of the salary allowed to the principal, unless in this act otherwise provided, and here, it is said, there is no provision for their payment in any other manner. The decision of this point involves a construction of subdivision 21 of section 173, *supra*.

It is true that it is not therein expressly declared that these deputies shall be paid out of the county treasury, but unless that was the intention of the legislature the clause means nothing, or, if it means anything, it is an absurdity. Without this clause the assessor could appoint all the deputies it provides for, and more if he chose to do so, but he would have to pay them himself. Evidently, then, the legislature intended something more than merely to empower him to appoint and pay deputies, for it is a cardinal rule of construction that every clause of a statute is to be given some effect. If, then, it is to be given effect, and is at the same time to be denied the effect of authorizing the payment of the deputies out of the county treasury, it can mean only this: that the assessor, out of a salary of eighteen hundred dollars per annum and some small percentage, is required by the

legislature to pay his deputies five dollars per day, a payment which for the number of deputies authorized would far exceed the whole income of the office. We cannot attribute this absurd intention to the legislature, and we cannot say that by this clause of the statute they intended nothing in addition to what was already fully provided for. The only conclusion possible is that they intended the deputies to be paid out of the county treasury.

5. One deputy sheriff and two deputy clerks were appointed under the provisions of section 216 of the act, which allows one additional deputy sheriff and two additional deputy clerks to be appointed in any county in which an additional judge of the superior court is provided for.

It is contended that this provision of the law is unconstitutional because it is not general and uniform. But it is general and uniform. It applies to the whole state, and takes effect in any county immediately upon the happening of the condition upon which its operation depends, viz., whenever an additional judgeship is created.

The judgment in each case should be affirmed, and it is so ordered.

McFarland, J., Henshaw, J., Temple, J., and Van Fleet, J., concurred.

Garoutte, J., concurred in the judgment.

[L. A. No. 239. Department Two.—September 13, 1897.]

P. W. EHLERS, Respondent, v. WANNACK BROTHERS, Appellants.

QUANTUM MERUIT—EVIDENCE—ARCHITECT'S SERVICES—EXPERTS.—In an action to recover the reasonable value of services rendered by an architect in drawing and preparing plans and specifications for buildings proposed to be erected by the defendant, after evidence of value has been given by expert witnesses, it is error for the court to exclude evidence offered by the defendant as to the length of time it would take to draw the plans and specifications. In such a case, the jury, or court sitting as a jury, is not concluded by the testimony of the experts, or their estimates of value.

ID.—ALLEGATIONS OF SPECIAL CONTRACT.—Where the complaint contains apt allegation of the reasonable value of the services rendered, and in addition alleges a special contract of employment, the failure to prove such special contract, and the finding of the court against the same, does not constitute a fatal variance.

ID.—CONDITIONAL PROMISE TO PAY—FINDINGS.—An answer in such action setting up an agreement that the services were not to be paid for unless the defendants were able to secure a liquor license for the sale of liquor in the buildings, and their inability to secure the same, constitutes a defense, necessitating a finding thereon. And a mere finding that there was no agreement as to the amount to be paid for the services is insufficient.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

Murphey & Gottschalk, for Appellants.

John W. Kemp, for Respondents.

McFARLAND, J.—This action was brought to recover from the defendants the reasonable value of plaintiff's alleged services rendered as an architect in drawing and preparing certain plans and specifications for buildings proposed to be erected by the defendants. Judgment was rendered for plaintiff in the sum of seven hundred and fifty-one dollars and forty-five cents; and from the judgment and an order denying a new trial the defendants appeal.

The evidence as to the value having been entirely that of expert witnesses, who differed in their estimates of the value, the defendants asked one of the witnesses how long it would take to draw the plans and specifications; to this question the plaintiff objected upon general grounds, and also upon the ground that it was not the proper method of proving the value of plaintiff's services; and the court sustained the objection, saying that architecture is a science, and that the value of an architect's labor is not to be measured by the time consumed. Defendant excepted to this ruling, and the question thus presented is the most important one in the case, although the arguments of counsel upon the point are very meager. The ruling was erroneous. It is settled law that a jury, or a judge sitting as a jury, is not concluded by the testimony of experts or their estimates of value.

The province of such testimony is only to aid a jury in coming to a conclusion; and it does not exclude the consideration of any other evidence which is pertinent to the issue involved. In *McLean v. Crow*, 88 Cal. 649, this court approved a charge by which the jury were instructed that "when they have all the facts and circumstances attending and surrounding the transaction the opinion of experts as to value, based upon the same evidence, is not conclusive; their opinions are not to be substituted for the common sense and judgment of the jury. The purpose of their introduction is to supplement the general knowledge and experience of the jury in relation to the matters before them, and thereby to aid them in the exercise of their own judgment, to the end that a more just and accurate conclusion as to the value may be drawn from the evidence." In *Estate of Dorland*, 63 Cal. 281, it was held that the lower court was not bound by the opinions of professional witnesses as to the value of an attorney's services. The general authorities are to the same effect. (See 8 Ency. of Pl. and Pr. 776, and quotations from judicial opinions in notes on that and the succeeding page.) Under these authorities the jury should have before them "all the facts and circumstances attending and surrounding the transaction"; and the time reasonably necessary to be occupied in performing the services in question is certainly one of "the facts and circumstances" which the jury should have before them when called upon to determine the value of such services. Of course, in certain cases, evidence of the time occupied in performing services would not be of any very great weight. For instance, in a suit brought by a physician to recover for his services in performing a difficult surgical operation, the time occupied in the performance of such operation would not be of much importance, although even in that case evidence of the time taken would be admissible. That also would be so with respect to certain kinds of services rendered by attorneys, although in many such cases the time occupied by an attorney in conducting litigation would be quite material. In a case like the one at bar, where a jury drawn from the general mass of citizens might not have much general knowledge of the value of the services of architects, it is entirely proper that in reaching a conclusion as to the value of such services

they should know about how long it would reasonably take an architect of fair capacity in his profession to perform the services. Of course, an exceedingly expert architect might do certain work in less time than one less expert, and in such case the services of the former would probably be considered as valuable as those of the latter, irrespective of the time which would be required for either to do the work; but all those considerations can easily be presented to a jury. And, after all, time reasonably necessary to perform certain services is clearly one of the elements to be considered by a jury in arriving at the value. Those following a particular vocation, although it may be a learned or scientific one, cannot adopt a scheme for the valuation of their own services which will bind all others; and, while a jury should consider the testimony of experts in such case, still they must exercise their own judgment in the end, and, in order to do so with full knowledge of the subject, they should have before them all the facts tending to show such value, among which is the time ordinarily necessary to perform the services. In the case at bar, the court, by excluding the evidence in question, evidently went upon the erroneous theory that the testimony of experts should alone be considered. For this reason the judgment must be reversed.

It is averred in the complaint that there was a special contract between the plaintiff and the defendants by which the plaintiff was to draw certain plans and specifications, and to superintend the construction of buildings to be erected according to said plans, and was to receive for the whole of such services five per cent of the estimated cost of the building; that after certain plans and specifications had been prepared by the plaintiff the defendants refused to construct any of such buildings, and thereby prevented the plaintiff from carrying out the contract, and that the reasonable value of plaintiff's services for what he did before stopped was a certain amount for which he brings suit. The evidence shows, and the court found, that there was no special contract; and, therefore, it is contended by defendants that there is a fatal variance between the complaint and the findings of fact. If when the complaint was drawn the pleader knew the real facts, he should not have alleged a special con-

tract; but, as the action was brought to recover the reasonable value of the services rendered, we do not see that the variance was material, or that the defendants could possibly have been injured thereby. We, therefore, do not think that the judgment should be reversed upon this point.

Appellants contend that the amount found by the court as to reasonable value of respondent's services was too large because one per cent of the estimated value of all the buildings was fixed as the proper amount for the preliminary sketches and specifications for all of said buildings, while in fact it appears that there were no plans or specifications for one of said buildings, to wit, the pavilion; but it is not necessary to examine this point closely, because upon another trial that matter can be properly adjusted.

In their answer the appellants averred that respondent, having learned that they contemplated the erection of certain buildings, voluntarily offered his services as architect; that they told him that they would not build unless they could procure a license for the sale of liquor in the pavilion and music hall which they contemplated erecting; that he might go on and draw the specifications, if he saw fit, with the understanding that he was not to receive any compensation therefor unless appellants procured the said license; that the work done by respondent, and for which this suit is brought, was done with that understanding, to wit, that he should not be paid unless the license was procured and the buildings erected; and that, not being able to procure the license, the erection of the buildings was abandoned. There was no finding as to this special defense of the defendants, and we think with appellants that the failure to find on this point was erroneous. Respondent contends that there was such a finding; but the finding relied on was simply "that there was no agreement between the plaintiff and defendants as to the amount to be paid to the plaintiff," etc. This was not a finding as to the special defense set up by the defendant, but relates merely to the amount. It was merely a finding that there was no special contract as to any particular sum that was to be paid under any circumstances, but does not dispose of the question raised by the answer, whether or not plaintiff was to be paid anything in the

event that the defendants should not obtain a license, and should abandon the erection of the building.

The judgment and order denying the motion for a new trial are reversed.

Henshaw, J., and Temple, J., concurred.

[Sac. No. 242. Department Two.—September 21, 1897.]

J. R. CLOWDIS, Respondent, v. FRESNO FLUME AND IRRIGATION COMPANY, Appellant.

NEGLIGENCE—MASTER AND SERVANT—CARELESS DRIVING OF BULL IN HIGHWAY—SERVANT'S KNOWLEDGE OF VICIOUSNESS—IGNORANCE OF MASTER.—Where injuries were inflicted upon the plaintiff by a vicious bull negligently driven in the highway by servants of the defendant, to whom the care of the animal was intrusted, without their securing it in any way, notwithstanding knowledge on their part that the bull was wild and would fight, and that it had previously knocked another man down on the same day, and had threatened attack upon others, the defendant is liable for such injuries, although he may have had no previous knowledge of the viciousness of the bull.

ID.—INJURY FROM VICIOUS ANIMAL—KNOWLEDGE OF OWNER—KNOWLEDGE OF SERVANT, WHEN IMPUTED TO MASTER.—In order to enforce the liability of the owner of an animal for injuries inflicted thereby to another person, it must appear that the animal was in fact vicious, and that the owner had knowledge of its viciousness, actual or imputed; and though knowledge by or notice to a servant of the viciousness of the master's animal, with respect to which he is charged with no duty, is not notice to the master, yet the knowledge of a servant to whom an animal is intrusted, of its vicious or ferocious disposition, is the knowledge of the master, sufficient to render him liable for injuries caused by such animal while in the custody and control of such servant.

ID.—OWNER WITH NOTICE OF VICIOUSNESS, LIABLE AS INSURER—NEGLIGENCE IMMATERIAL.—Where injury is caused by a vicious animal which the owner knew to be vicious, at the time of and previous to the injury, the owner is liable as an insurer, and the question of negligence in such case is immaterial.

ID.—REPRESENTATION OF MASTER BY SERVANT—DUTY TO PUBLIC—IMPROPER PERFORMANCE.—Where a duty is owed to the public, a servant to whom its performance is intrusted represents the master, however subordinate or menial his rank may be, and within the scope of his employment to perform such duty, his knowledge is the master's knowledge, and his acts the master's acts, and the inquiry as to the master's responsibility is the same as if he had personally entered

upon the performance of the duty, under the same circumstances, and with the same knowledge possessed by his servant; nor can a failure to perform such duty, or its improper performance, be excused by showing that its execution was intrusted to a servant even of approved carefulness, knowledge, or skill, but it must be further shown that the servant in the particular matter exercised the full degree of care, and showed the requisite amount of skill.

ID.—NEGLIGENCE OF SERVANTS—KNOWLEDGE OF MASTER IMMATERIAL—KNOWLEDGE ACQUIRED BY SERVANTS DURING PERFORMANCE.—The master is liable to third persons for injuries caused by the negligent performance of the duty of his servants while acting within the scope of their employment, and, in such case, all question as to the master's knowledge is eliminated as immaterial; and the fact that additional knowledge of facts material to the question of negligence of such servants was acquired by them after the employment was undertaken, and that the master was wholly ignorant of those facts, cannot exonerate the master from liability for the negligence of his servants.

ID.—JOINDER OF CAUSES OF ACTION IN ONE COUNT—INJURY FROM ANIMAL KNOWN TO BE VICIOUS—NEGLIGENCE OF SERVANTS—INSTRUCTIONS UPON EACH CAUSE OF ACTION—CONFUSION WITHOUT PREJUDICE—APPEAL.—Where the complaint joined in one count two distinct causes of action, one for injury caused by a vicious bull of defendant, which defendant knew to be vicious, and the other for injury caused by the negligent performance of duty by the servants of the defendant in the care and driving of the animal intrusted to them by the defendant, and issue was joined upon each cause of action, without objection to their union in one count, and the evidence upon each cause of action was sufficient to uphold a verdict for plaintiff upon either, an instruction that before plaintiff could recover he must establish the facts that the bull at the time he inflicted the injury was vicious, and that defendant had knowledge of its vicious character, and another instruction that defendant was liable for injury resulting from the negligence of defendant's employees in the performance of their duty, are not contradictory or self-destructive; and whatever confusion may have resulted from failure to point out clearly to the jury the full distinction between the two causes of action must have tended to defendant's advantage, and is not ground for reversal of a judgment in favor of plaintiff, upon defendant's appeal therefrom.

ID.—DAMAGES—VERDICT NOT EXCESSIVE—CONFLICTING EVIDENCE—PROOF FOR PLAINTIFF.—Where there was conflicting evidence as to the nature and permanence of the injuries received by plaintiff from the attack of a vicious bull, for which defendant is liable, but, on the part of the plaintiff, it was shown that the coccyx was fractured, the muscles of the region atrophied, the sciatic nerve made tender and painful to pressure, and that there were other symptoms of spinal injury, upholding a finding that plaintiff's health was seriously impaired, if not positively wrecked, it may not be said that a verdict for the plaintiff for damages in the sum of five thousand five hundred dollars was excessive.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. E. W. Risley, Judge.

The facts are stated in the opinion of the court.

L. L. Cory, for Appellant.

The corporation defendant was not chargeable with the knowledge acquired by its mere ministerial servants. (4 Thompson on Corporations, sec. 5237; Pomeroy's Equity Jurisprudence, sec. 668; Tiedeman on Equity, sec. 100; *Fairfield Sav. Bank v. Chase*, 72 Me. 226; 39 Am. Rep. 219; *Consolidated Coal Co. v. Block etc. Co.*, 53 Ill. App. 565; *Grant v. Cole*, 8 Ala. 519; *Shaver v. New York etc. Transp. Co.*, 31 Hun, 55; *Stiles v. Cardiff etc. Co.*, 33 L. J. Q. B. 310; *Twigg v. Ryland*, 62 Md. 380; 50 Am. Rep. 226; *Labbe v. Corbett*, 69 Tex. 503.) Knowledge by the owner of viciousness is essential to his liability for injuries caused by a vicious animal. (*Laverone v. Mangianti*, 41 Cal. 138; 10 Am. Rep. 269; *Finney v. Curtis*, 78 Cal. 498; *Wilkinson v. Parrott*, 32 Cal. 102; *Ficken v. Jones*, 28 Cal. 618.) A new trial should be granted for conflicting and contradictory instructions. (*Haight v. Vallett*, 89 Cal. 245; 23 Am. St. Rep. 465; *Brown v. McAllister*, 39 Cal. 573; *Aguirre v. Alexander*, 58 Cal. 21, 27; *McCreery v. Everding*, 44 Cal. 246; *Sappenfield v. Main Street etc. R. R. Co.*, 91 Cal. 48.) Also, for excessive and unconscionable damages. No constructive malice could be imputed to the defendants to warrant exemplary damages.

F. Laning, and M. K. Harris, for Respondent.

The owner of a vicious animal, knowing its vicious propensities, is responsible as an insurer for all injuries sustained therefrom by a person free from fault. (*Laverone v. Mangianti*, 41 Cal. 138; 10 Am. Rep. 269; *McCaskill v. Elliott*, 5 Strob. 196; 53 Am. Dec. 706; *Partlow v. Haggarty*, 35 Ind. 179; *Poppewell v. Pierce*, 10 Cush. 509; *Caldwell v. Snook*, 35 Hun, 73.) If one drives a bull along a highway, knowing its propensity to attack and gore persons, and takes no precautions to prevent it, he is responsible if such an attack is made. (Cooley on Torts, 409; *Hewes v. McNamara*, 106 Mass. 281.) The knowledge of a servant, to whom an animal is intrusted, of its viciousness, is the

knowledge of the master, as respects liability for injuries committed by it. (*Brice v. Bauer*, 108 N. Y. 428; 2 Am. St. Rep. 454; Cooley on Torts, 406, note.) Defendant will be presumed to know of the known and ordinary propensities of a bull, especially of a wild bull, to attack people. (*Barnum v. Terpenning*, 75 Mich. 557; *Linnehan v. Sampson*, 126 Mass. 506; 30 Am. Rep. 692.) The defendant is responsible for the negligence of its servants or agents while in charge of the bull, and acting in the scope of their employment. (1 Parsons on Contracts, 118; Bishop on Noncontract Law, secs. 436-40, 442, 445; *Weed v. Panama R. R. Co.*, 17 N. Y. 362; 72 Am. Dec. 474; Morawetz on Corporations, secs. 89, 90, 91, 95; *Cohen v. Dry Dock etc. R. R. Co.*, 69 N. Y. 170; *Barnum v. Terpenning*, *supra*.) The instructions, taken as a whole, properly present the law applicable to the case, and any seeming conflict between isolated parts is not ground for reversal. (*People v. Turcott*, 65 Cal. 126; *People v. Dennis*, 39 Cal. 636.) The amount of the verdict was within the discretion of the jury, and was not excessive, not being obviously disproportionate to the injury proved by plaintiff's evidence. (*Morgan v. Southern Pac. Co.*, 95 Cal. 501; *Gorman v. Southern Pac. Co.*, 97 Cal. 1; 33 Am. St. Rep. 157; *Aldrich v. Palmer*, 24 Cal. 513; *Wheaton v. North Beach etc. R. R. Co.*, 36 Cal. 590.)

HENSHAW, J.—Plaintiff recovered damages for injuries inflicted by a vicious bull, the property of defendant. He averred that, prior to the attack upon him, the bull was of a vicious disposition and dangerous character, and that the fact was known to defendant, its agents, and employees. He also averred that the injury was occasioned by the negligent conduct of defendant's servants engaged in driving the bull upon a public highway. Defendant appeals from the judgment and from the order denying a new trial.

The facts disclosed by the evidence are as follows: In April, 1895, the defendant, which was engaged in the lumber business in the Sierra Nevada mountains, in Fresno county, sent two of its employees, John Lovelace and G. W. Treece, to a ranch on Kings river known as "The Grant," where its cattle had been pasturing during the winter, to bring them to the mountains.

There were some thirty-six head, consisting of bulls and steers. The bull in question was wild, and the men had difficulty in yoking him. On the second day after they started, this bull became tired and troublesome to drive and was allowed to remain temporarily at the ranch of Ben McCloskey, a place about four miles from Sanger, while the other cattle were driven on. About noon, during the absence of the drivers, McCloskey and his neighbor, Martinez, went into the corral to look at the animal, and while they were walking around he charged upon Martinez, knocking him down, jumped the fence, and went out into the grainfield. In the afternoon Treece and Lovelace returned for the bull, when McCloskey related to them what had taken place. They asked why he had not corraled the animal. McCloskey answered that he had only a single-barreled shotgun, and would not undertake to corral that bull with anything less than a Winchester rifle. They secured the bull, and themselves on horseback drove him along the county road in the direction of the town of Sanger. On the road they were overtaken by two men walking. These men endeavored to pass the bull and walk ahead, when the bull turned as though he would charge them. One of the drivers rode between them and the bull and warned them to look out, that the bull had already knocked one man down and would fight. Proceeding down the road they approached a culvert, where several men were standing. A short distance from this bridge the plaintiff was staking a horse on land adjoining the road, and which he had at that time leased and was in possession of. As the drivers and the bull approached one of the drivers remarked: "We will see some fun," or "Watch these fellows scatter when we come up there with the bull." Something attracted the attention of the men, and, not liking the appearance of the bull, they made for an adjoining fence. Clowdis, who was a short distance away and behind his horse, did not observe the danger, but hearing a voice, he stepped out from behind his horse, and seeing the bull on the bridge asked if he would fight. The question was answered by the bull, which at once charged. Clowdis turned and ran for an out-house some little distance off, but before he reached it he was overtaken, tossed in the air, and received the injuries complained of. During all of this time the bull was driven ahead of the men,

and was not secured in any way. He was six years old, and up to October, 1894, had been accustomed to run with a herd of dairy cows on the range in the mountains. In October, 1894, he was purchased by the defendant and broken to an ox team, and worked about six weeks and then placed upon pasture, where he remained until April, 1895. Witnesses for the defendant testified that during the six weeks when he worked he was a nervous and high-strung animal, but before this time had not displayed a disposition to attack.

Over these facts there is little or no dispute; but under them appellant contends that it is entitled to a reversal. Herein it is insisted that the evidence fails to show foreknowledge by defendant of the vicious disposition of the animal.

It is well settled in cases such as this that the owner of an animal, not naturally vicious, is not liable for an injury done by it, unless two propositions are established: 1. That the animal in fact was vicious; and 2. That the owner knew it. (*Finney v. Curtis*, 78 Cal. 498.) Thus, if an animal theretofore of peaceable disposition, while in charge of the master or of a servant, suddenly and unexpectedly, either through fear or rage, inflicts injury, neither is responsible, if at the time he was in the exercise of due care. But, conversely, the owner of such an animal knowing its vicious propensities is liable for injury inflicted by it upon property or upon the person of one who is free from fault. (*Laverone v. Mangianti*, 41 Cal. 138; 10 Am. Rep. 269.)

These propositions are accepted by appellant's counsel; but their contention in argument is that the knowledge by defendant's servants of the viciousness was acquired at such time and under such circumstances that it could not be conveyed to the defendant, and, therefore, could not be imputed to it in law; and, further, that the men engaged in driving the bull were not agents of the corporation, but mere servants, not having general charge of the animal, but sent upon a limited mission with regard to it, and that for this additional reason their knowledge cannot be held to be the knowledge of their employer.

It is quite true that knowledge by or notice to a servant charged with no duty in the matter, of the vicious propensities of an animal owned by the master, is not notice to the master. The rule, however, is that a servant's knowledge, to whom an animal is in-

trusted, of its ferocious disposition, is knowledge of the master sufficient to render the latter liable. (*Brice v. Bauer*, 108 N. Y. 428; 2 Am. St. Rep. 454; Cooley on Torts, 406, and note.)

In the present case Lovelace and Treece had been put in complete charge of the bull. It is a fundamental and most important principle of the law governing the responsibility of masters that whatever duty they owe to the public (or to their employees) must be performed, and a failure to perform, or improper performance, cannot be excused by a showing that execution was delegated to a servant even of approved carefulness, knowledge, or skill. It must further be shown that the servant in the particular matter exercised the full degree of care and showed the requisite amount of skill. And this is true, however subordinate or menial may be the rank of the servant. Whatever be his position, in that special employment he represents the master, and within its scope his knowledge is the master's knowledge, his acts the master's acts. (*Higgins v. Williams*, 114 Cal. 176; *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417.) Everyone, whether acting individually or through agents, is bound to exercise ordinary care to prevent injury to the person or property of another. (Civ. Code, secs. 1708, 1714, 2330, 2338.) Therefore, when, as here, Lovelace and Treece had been sent upon an independent mission, and put in complete charge of the animal, they stood in the performance of their task in the place of the defendant, and the question of defendant's responsibility will be answered as may be answered the inquiry: What would have been the master's responsibility and liability had he personally been in charge of the animal? To this there can be but one answer. He would have been liable. Twice before on that very day had the bull evinced its ugly disposition by attacks actual and threatened. Here was ample proof of the fact of viciousness and of the knowledge of that fact brought home to the master.

There is yet another and independent view of the matter which may be taken, and in this is eliminated all question of the master's knowledge. That view turns upon the master's liability for the negligent performance by a servant of a duty within the scope of his employment. The driving of the bull upon the highway was not only within the employment of Lovelace and Treece,

but it was their express task. In the performance of this duty, if injury was occasioned to one without fault by reason of their negligence, the master was liable. At the outset of the drive, when the men may be assumed to have believed that the beast was gentle, if it had suddenly and unexpectedly attacked and injured some person, it might well be argued that they were performing their task with due care, and that for the unexpected onslaught the master was not liable. But when thereafter while engaged in this undertaking they acquired knowledge of the animal's evil propensities, it became a question of fact for the jury whether or not they exercised the requisite degree of care in their subsequent management of it. The circumstance that the additional knowledge was acquired by them after the employment was undertaken, and was not known either to them or to their employer at the time it commenced, would not exonerate the latter. If the conductor of a passenger train should at any time during the journey discover a defective wheel and, continuing the trip, injury should thereby result, the company would not be exonerated because the knowledge was acquired after the train had started. Yet there is no difference in principle between the cases, and what difference exists is merely in the degree of care exacted by law.

Precisely such a cause of action as the one which we have been considering was that of *Ficken v. Jones*, 28 Cal. 618; and another in which the question is considered with much elaboration is that in *Barnum v. Terpenning*, 75 Mich. 557.

This is unquestionably a distinct cause of action from that which would hold the master responsible by reason of his foreknowledge; but the complaint in this case sufficiently charges upon both causes of action. True, they are joined in one count, but no objection was made to the pleading upon this ground.

Appellant complains of the instructions given by the court as being contradictory and self-destructive. In one part of the charge the jury was instructed, in effect, that defendant was liable for injury resulting from the negligence of its employees in the performance of a given duty. In another part the jury was told that before plaintiff could recover he must establish the facts that the bull, at the time he inflicted injury, was vicious, and that defendant had knowledge of its vicious character.

But this grievance has its foundation in appearance rather than in substance. Undoubtedly, it would have been well founded had the pleading been confined to a charge that injury was occasioned by an animal which defendant knew to be vicious at the time. In such instances the owner is an insurer against the acts of the animal to one who is injured without fault, and the question of the owner's negligence is not in the case. (*Laverone v. Mangianti supra*; 10 Am. Rep. 269.) But the action at bar charged not only upon this but upon another and distinct cause of action, namely, an action for damages occasioned by the negligent performance upon the part of defendant's servants of an employment with which they were intrusted. Here, proof of negligence was essential to a recovery. It would certainly have been better if the instructions had more clearly recognized the distinctions between these two causes of action. But in and of themselves they were not wrong in point of law, nor, under a complaint charging upon both causes of action, were they contradictory. Both causes of action were here charged, though joined in one count; upon both issue was joined, and to both evidence was addressed sufficient to uphold the verdict of the jury upon either. The instructions could not then have injured appellant, and, if, by failing clearly to recognize the distinctions pointed out, they served to confuse the jury, that confusion must certainly have tended to defendant's advantage.

The jury rendered a verdict for plaintiff in the sum of five thousand five hundred dollars. There was, as is usual, much conflict in the testimony of the physicians over the nature and permanency of the injuries. But on the part of plaintiff it was shown that the coccyx was fractured, the muscles of the region atrophied, the sciatic nerve tender and painful to pressure, with other symptoms of spinal injury, upholding a finding that plaintiff's health was seriously impaired, if not positively wrecked. It may not be said under such a statement that the verdict was excessive.

The judgment and order appealed from are affirmed.

McFarland, J., and Temple, J., concurred.

[Crim. No. 247. Department Two.—September 21, 1897.]

THE PEOPLE Respondent, v. CLARENCE TURNER, Appellant.

CRIMINAL LAW—ASSAULT WITH INTENT TO MURDER—EVIDENCE—IDENTIFICATION OF DEFENDANT—CROSS-EXAMINATION—APPAREL.—Upon a charge of assault with intent to commit murder, where the identification of the defendant by the prosecuting witness was a vital point in the case, it is permissible and important for the defendant to impair, so far as he can by legal evidence, the force of the identifying evidence, and it is legitimate cross-examination upon the question of identity to ask the witness concerning the apparel of his assailant, and upon answer made that the coat of defendant exhibited to him was like the coat worn, it is proper to show that upon the preliminary examination, and upon the former trial the same witness had identified the same garment with positiveness, and that evidence was afterward adduced upon the former trial to show that defendant had purchased it subsequent to the date of the alleged offense, and it is reversible error to refuse to permit such evidence.

Id.—PISTOL NOT IDENTIFIED—STRIKING OUT EVIDENCE—INSTRUCTION TO DISREGARD—ERROR NOT REVERSIBLE.—Where the prosecuting witness gave a general description of the size and appearance of the pistol with which he had been threatened, and, over defendant's objection, it was shown that when arrested defendant had two loaded pistols, one of which was admitted in evidence, but there was no attempt of the prosecuting witness to identify it, and upon proof by the defendant that the pistols were purchased by him after the date of the assault, the court reconsidered its ruling and struck out all the evidence as to defendant's pistols, and instructed the jury to disregard it, although it would have been a wiser procedure for the court in the first instance not to receive the evidence until satisfied of its admissibility, yet, under the circumstances, it cannot be said that the injury from the admission of the evidence afterward stricken out was reversible error.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. E. A. Belcher, Judge.

The facts are stated in the opinion of the court.

Reel B. Terry, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

HENSHAW, J.—Defendant appeals from a judgment of conviction for assault with intent to commit murder.

The prosecuting witness, Dyer, testified that he was assaulted in his room about midnight by a man who knocked him senseless with a slung-shot, and who, upon his recovering consciousness, presented a pistol and threatened to kill him. He grappled with his assailant, who broke away and fled. He had never seen him before, but two weeks afterward, at the Oakland city jail, recognized the defendant as the man. He further testified upon direct examination that the man's hat was upon the back of his head, the light shone upon his face, he saw his features distinctly, and so identified him.

Upon cross-examination he was asked as to the clothing worn by his assailant, and answered that he wore an overcoat like that which was in court and was exhibited to him. He was then asked if, upon the preliminary examination and upon the former trial, he had not positively identified the coat as being the one worn by the man who entered his room. Objection to this line of examination was sustained.

The identification of the defendant by the prosecuting witness was a vital point in the case, and it was clearly permissible and important for the defendant to impair, so far as he could by legal evidence, the force of this testimony. It was legitimate cross-examination upon the question of identity to ask the witness concerning the apparel of his assailant. He having answered that the coat exhibited was like the coat worn, it was perfectly proper to show a variance between this statement and that made by the same witness upon a former trial when he identified with positiveness the particular garment. For it is apparent that a failure by a witness upon a second trial to speak with certainty upon a matter made the subject of absolute identification upon a former trial would, unless the discrepancy were satisfactorily explained, tend to weaken and impair the effect of his evidence. Particularly is this true under the circumstances here presented, where it is made to appear that upon the former trial the defendant, after the positive identification of the overcoat, produced strong evidence to show that he had purchased it subsequent to the date of the alleged offense.

The prosecuting witness gave a general description of the size and appearance of the pistol with which he had been threatened.

Over objection of defendant, it was permitted to be shown that when arrested two weeks after he had in his possession two loaded pistols, and one of them was admitted in evidence. There was not the slightest attempt at identification of this pistol by the complaining witness. The defendant then proved that the two pistols had been purchased after the date of the assault. At this point the court reconsidered its ruling and struck out all of the evidence on either side relative to the pistols saving the statement of the prosecuting witness, and the jury was instructed to disregard it. Defendant complains that the injury done him by the admission of improper evidence was not cured by the subsequent order striking it out. It would be a wiser procedure, certainly in criminal trials, for the court not to receive evidence until satisfied of its admissibility. For there can be no doubt that the effect of injurious evidence improperly admitted can never be wholly removed by an instruction to disregard it. Yet we are not prepared to say that in this case the injury amounted to reversible error.

No other points presented by appellant seem to call for consideration.

The judgment and order are reversed, and the cause remanded for a new trial.

Temple, J., and McFarland, J., concurred.

[Crim. No. 222. Department One.—September 22, 1897.]

THE PEOPLE, Respondent, v. MANUEL GOMEZ, Appellant.

CRIMINAL LAW—ASSAULT WITH INTENT TO COMMIT RAPE—SUFFICIENCY OF EVIDENCE—CREDIBILITY OF WITNESSES—PROVINCE OF JURY.—The evidence of the prosecutrix alone may be sufficient to support a verdict of guilty of an assault with intent to commit rape; and when her evidence is corroborated by the testimony of another witness, the verdict will not be disturbed, except under very exceptional circumstances, the credibility of the witnesses being essentially a matter for the jury to pass upon.

ID.—WILLING SUBMISSION OF GIRL UNDER AGE OF CONSENT—SIMPLE ASSAULT NOT INVOLVED—INSTRUCTION.—Where the prosecutrix was a girl under the age of consent, and whatever occurred took place with her entire

willingness, the offense of simple assault is not in the case, the element of force being wanting; and, upon a charge of an assault with intent to commit rape, it is proper for the court to instruct the jury that their verdict should be either guilty of the offense charged, or not guilty.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Geo. H. Bahrs, Judge.

The facts are stated in the opinion of the court.

Henry E. Highton, and Theodore J. Roche, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

GAROUTTE, J.—The defendant has been convicted of an assault with intent to commit rape. Upon this appeal he insists that the evidence is insufficient to support the verdict. In view of the record before us, this contention cannot be successfully maintained. In many cases decided by this court of the nature here under investigation it has been held that the evidence of the prosecutrix alone may be sufficient to support the verdict. In this case, if her evidence was believed by the jury, it was amply sufficient to authorize the verdict rendered. In addition to the evidence of the prosecutrix we find in the record the testimony of another witness fully corroborating all material matters of which she testified. Under such circumstances we will not disturb the verdict of the jury for the reason urged. The credibility of these two witnesses was a matter essentially for the jury to pass upon, and their determination as to that fact will not be set aside by this court, save under very exceptional circumstances. Those circumstances are not present in this case.

It is claimed that the court committed an error in charging the jury that their verdict should be either guilty of the offense charged, or not guilty. It is insisted that by such charge the court in effect told the jury that the offense of "assault" was not included in the information. We assume that such was the effect of the instruction, and yet upon such assumption the charge given was the only proper one. The prosecutrix was a girl under

the age of consent. Whatever occurred between her and the defendant took place with her entire free will. There was no protest or objection upon her part to the doing of everything that was done, but, upon the contrary, her willingness is fully established. Under such circumstances the offense of "assault" is not in the case. The evidence in no way points toward it; for an attempt to use force is a necessary element of every assault. Here there is no pretense of such an attempt. If in the minds of the jury the acts of defendant were not done with an intent to commit rape, no crime, under this information, was proven; for then the age of the prosecutrix became an immaterial matter. If the defendant had been charged in the first instance with the offense of assault, instead of the offense here standing against him, he could not have been legally convicted under this evidence, for the element of force is wanting, and hence there is no assault. *People v. Verdegreen*, 106 Cal. 211, 46 Am. St. Rep. 234, is not opposed to these views, but upon a careful reading will be found fully supporting them.

Judgment and order affirmed.

Van Fleet, J., and Harrison, J., concurred.

[Crim. No. 304. Department One.—September 22, 1897.]

THE PEOPLE, Respondent, v. WILLIAM LUDWIG, Appellant.

CRIMINAL LAW—TRIAL—ORAL CHARGE—SHORTHAND NOTES—PRESUMPTION UPON APPEAL.—Where the record upon appeal from a judgment of conviction in a criminal case shows that oral instructions were given to the jury, but fails to show that the oral charge was not taken down in shorthand by the phonographic reporter, the legal presumption is that it was so taken down, and the fact that no transcribed copy of the reporter's notes appears in the record does not overcome the presumption, such copy being no part of the record unless indorsed by the judge; and it devolves upon the appellant to show by bill of exceptions that the oral charge was not in fact taken down by the reporter to overcome the presumption to the contrary.

APPEAL from a judgment of the Superior Court of Santa Clara County. W. G. Lorigan, Judge.

The facts are stated in the opinion of the court.

H. V. Morehouse, and F. J. Hambly, for Appellant.

William F. Fitzgerald, Attorney General, and C. W. Post, Deputy Attorney General, for Respondent.

GAROUTTE, J.—Defendant appeals from the judgment. He asks for a reversal upon the ground that the court orally instructed the jury, and that such instructions when given were not taken down by the phonographic reporter as contemplated by section 1093 of the Penal Code.

If the facts are as contended for by appellant, he has shown reversible error, but he fails in establishing those facts. The minutes of the trial disclose that oral instructions were given to the jury, but we fail to find anything in the record showing that they were not taken down at the time by the phonographic reporter. The legal presumption is that such was the fact, and it is for the defendant to overthrow that presumption. (*People v. Ferris*, 56 Cal. 442.) Defendant produces the judgment-roll, or more properly speaking, the record of the action, and this record contains no charge of the court to the jury. He argues that the instructions are made a part of the record of the action by section 1207 of the Penal Code, and that when he produces the record of the action, properly certified, containing no instructions, it must be assumed that the charge was not taken down by the phonographic reporter. In *People v. January*, 77 Cal. 179, the trial judge gave an oral charge to the jury which was taken down by the shorthand reporter, but, when transcribed, the judge refused to indorse it as the charge given. Upon appeal, in construing sections 1176 and 1207 of the Penal Code, this court held that the record of the action, as referred to in section 1207, should only contain those instructions, written and oral, that are indorsed by the judge, and for that reason refused to consider the oral charge written out and certified by the reporter which was not indorsed by the judge. In that case there was no bill of exceptions. Upon the legal principles there declared the record of this action more properly establishes the fact that the charge when transcribed by the reporter was not indorsed by the judge of the trial court than it does the fact con-

tended for by defendant, to wit, that the charge was not taken down by the reporter. As already suggested, the presumption is, that the charge was taken down, and we are satisfied that presumption is not overthrown by the showing made, in view of the law as declared in the January case.

Judgment affirmed.

Van Fleet, J., and Harrison, J., concurred.

[S. F. No. 471. Department One.—September 22, 1897.]

RUDOLF HAGEN et al., Respondents, v. ADOLPH H. BETH et al., Appellants.

MANDATORY INJUNCTION—REMOVAL OF TRADE SIGNS PENDENTE LITE.—The granting of a mandatory injunction pending the trial of an action, and before the rights of the parties in the subject matter which the injunction is designed to effect have been definitively ascertained, is not permitted except in extreme cases where the right thereto is clearly established, and it appears that irreparable injury will flow from the refusal; and in an action to enjoin the use of a trade name a mandatory injunction to compel the removal of trade signs by the defendants *pendente lite* is erroneous, where the ultimate rights of the parties cannot be determined in advance of the trial of the action.

APPEAL from an order of the Superior Court of the City and County of San Francisco, granting a preliminary injunction. A. A. Sanderson, Judge.

The facts are stated in *Schwarz v. Superior Court*, 111 Cal. 106.

Morrison & Foerster, for Appellants.

J. J. Scrivner, for Respondents.

VAN FLEET, J.—Appeal from an order granting a preliminary injunction.

The nature of the present action and the terms of the order appealed from will be found sufficiently stated in *Schwarz v. Superior Court*, 111 Cal. 106, where the same order was under consideration upon certiorari to review the action of the court below in attempting to punish these appellants for contempt for an al-

leged violation of its terms. It was there held that the order, in so far as it directed and required the removal of the obnoxious signs, was mandatory in character.

To the extent that the injunction is mandatory it was erroneously granted. The granting of a mandatory injunction pending the trial, and before the rights of the parties in the subject matter which the injunction is designed to affect have been definitively ascertained by the chancellor, is not permitted except in extreme cases where the right thereto is clearly established and it appears that irreparable injury will flow from its refusal. (High on Injunctions, sec. 2; *Gardner v. Stroever*, 81 Cal. 148.)

The showing in the record before us is not such as to entitle respondents to have the objectionable signs removed pending the final determination of the rights of the parties in the disputed name. It cannot be determined therefrom what the final judgment as to those rights may or should be upon a trial of the action.

As to the merely preventive features of the injunction, we cannot say that the showing was insufficient to invoke the discretionary power of the court, and the order in that respect should stand.

The other questions discussed are such as will more appropriately arise upon a trial on the merits.

The order is reversed, with directions to the court below to modify its injunction by striking therefrom the requirement for the removal of the signs.

Garoutte, J., and Harrison, J., concurred.

[Crim. No. 248. Department Two.—September 22, 1897.]

THE PEOPLE, Respondent, v. GEORGE PATRICH, Appellant.

CRIMINAL LAW—SUSPENSION OF SENTENCE—DIRECTION FOR DEPORTATION.—

After a verdict convicting a defendant of a felony has been rendered, an order, made at his request, by its terms directing a suspension of judgment and allowing him to ship upon a United States deep water vessel, and requiring the sheriff to make a due return thereof to the court, is, in legal effect, a mere order that sentence be suspended until further order of the court; and the court has jurisdiction, several years thereafter, to set aside such order, and sentence the defendant to imprisonment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. A. Belcher, Judge.

The facts are stated in the opinion of the court.

William Hoff Cook, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

McFARLAND, J.—The defendant was charged with burglary, was convicted of burglary in the second degree, and was sentenced to suffer imprisonment of five years in state prison. He appealed from the judgment upon the judgment-roll alone.

On June 22, 1892, after the verdict of guilty had been rendered, the court entered the following order: "In this cause the defendant having been heretofore convicted of the crime of burglary, and this being the day set for sentence, therefore, upon motion of counsel for defendant, and the district attorney consenting thereto, it is hereby ordered that sentence in this cause be and the same is hereby suspended, and the defendant herein is hereby allowed to ship upon the United States ship 'Independence,' a deep water vessel, and it is hereby ordered that the sheriff of the city and county of San Francisco be and is ordered to make a due return to this court." On June 29, 1893, the sheriff solemnly made a return—as though he had been executing a judgment—as follows: "I hereby certify that I delivered the prisoner, George Patrick, on board the receiving ship 'Independence,' at Mare Island. He passed a satisfactory examina-

tion and shipped as landsman under his true name, Gus O'Doule. I remained on board until he donned his uniform of a sailor in United States navy." Nothing further concerning appellant appears until April 13, 1896, when a bench warrant was issued for his arrest. Afterward the order of "suspension of judgment" was set aside, and on April 25, 1896, the appellant came into court, was duly informed of the prior proceedings in the case, and judgment was entered against him of imprisonment as hereinabove stated.

Appellant's counsel contends "that the order of deportation having been complied with, that the court lost jurisdiction to impose the said sentence of imprisonment," and that "as the defendant had complied with the order of the court made in 1893, the court lost jurisdiction to vacate the order of suspension in 1896, and order the defendant to prison." But there was no order of deportation; the court could not have made any such order, and the part of the record above quoted of the date of June 22, 1893, does not purport to be an order of deportation. What is said there about allowing the appellant to ship upon the United States ship "Independence," and the return of the sheriff that he had so shipped, is of no legal value or consequence whatever. In substance it is a mere order that sentence be suspended until the further order of the court; and said order having been made "upon motion" of the defendant, he cannot be heard to complain of it.

The judgment appealed from is affirmed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[L. A. No. 255. Department Two.—September 22, 1897.]

FRANCIS J. McKEAN, Respondent, *v.* **GERMAN-AMERICAN SAVINGS BANK**, Appellant.

MORTGAGE—BANK—GENERAL DEPOSIT CANNOT BE APPLIED TO MORTGAGE INDEBTEDNESS.—Under section 728 of the Code of Civil Procedure, providing that "there shall be but one action for the recovery of any debt . . . secured by mortgage," a bank, holding a debt secured by a mortgage, cannot apply, in reduction or cancellation of the debt, a claim due by it to the mortgagor, founded upon a general and ordinary deposit of money with it by the mortgagor.

ID.—SETOFF—CROSS DEMANDS—In an action to recover such a deposit, the bank is not entitled, under section 438 of the Code of Civil Procedure, to set off the amount due it on the mortgage indebtedness, nor are such cross-demands deemed to be compensated, as far as they equal each other, under section 440 of such code.

APPEAL from a judgment of the Superior Court of Los Angeles County. **Waldo M. York**, Judge.

The facts are stated in the opinion.

Walter Bordwell, for Appellant.

Isidore B. Dockweiler, for Respondent.

CHIPMAN, C.—This was an action brought by plaintiff against defendant to recover judgment for four hundred dollars alleged to have been deposited with the defendant by **John Schwickert** as a general and ordinary deposit, payable on demand to said Schwickert or assigns. The complaint averred an assignment by Schwickert to plaintiff. For answer defendant showed that at the time of the deposit Schwickert was indebted to it upon certain promissory notes secured by mortgage; that under the terms of the notes they were due, and that defendant had applied the money in reduction of Schwickert's indebtedness before the assignment by Schwickert to plaintiff, and before any demand by plaintiff had been made upon it. Judgment passed for plaintiff, and defendant appealed.

The question thus presented is that of the right of the holder of a debt secured by mortgage to apply in reduction or cancellation of the debt a claim due by the holder to the debtor; and the determination of this question necessarily involves a considera-

tion of the scope and meaning of section 726 of the Code of Civil Procedure, which declares that "there shall be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provision of this chapter." Appellant contends that it is settled law that where a depositor in a bank is indebted to the bank by bill, note, or other independent indebtedness, the bank has the right to apply so much of the funds of the depositor to the payment of his matured indebtedness as may be necessary to satisfy the same, and this general principle he supports with the citation of numerous pertinent authorities.

It is not denied, but it is conceded by respondent that appellant correctly states the law as an abstract proposition. But the principle is denied as applicable to this case, in which the answer shows that at the time the deposit was so applied the notes on which it was applied were secured by mortgage on real estate. The answer avers that the "property covered by said mortgage is insufficient to satisfy the debt secured thereby," but does not allege that it is wholly valueless. It is alleged in the answer, and admitted by the demurrer, that appellant took by assignment the Schwickert notes before the deposit was made, and, of course, before respondent became the owner by assignment of the deposit. Respondent, therefore, stands in Schwickert's shoes in the matter. The question recurs, Could respondent apply this deposit on the secured notes of Schwickert?

In the case of *Bartlett v. Cottle*, 63 Cal. 366, the action was brought upon a promissory note, the complaint being silent as to the mortgage. The answer set up the mortgage in abatement of the action. The court below found the security of no value, and gave plaintiff judgment. It was contended on appeal that the judgment ought not to stand because the security was not valueless when the action was commenced. Mr. Justice Thornton, in giving the decision of this court, said: "We are of opinion that the security was not without value at the time referred to. . . . This action on the note, then, cannot be maintained under the provisions of section 726 of the Code of Civil Procedure. According to this section there can be but one action, and that of the character prescribed in it."

In the case of *Biddell v. Brizzolara*, 64 Cal. 354, it was so held, and in the opinion, given in Bank by Mr. Justice McKinstry, it was further said: "Whatever the form of the debt, the mortgagor can be legally compelled to pay no part of it until decree is entered for the sale of the premises mortgaged, and the liability which shall then accrue to him is a liability to pay only a deficiency, which shall appear on the sheriff's return. The liability of the mortgagor is, therefore, contingent on the fact that a sale of the mortgaged premises shall satisfy the debt and costs. It is against this contingency that the purchaser indemnifies him." See, also, *Porter v. Muller*, 65 Cal. 512, in which it was held that the proceeds of the sale of the mortgaged premises constitute a primary fund out of which the mortgage debt must be paid.)

In the case of *Brown v. Willis*, 67 Cal. 235, it was held that this section means that: "A mortgagor cannot be compelled to pay any part of his mortgage debt until a decree is entered for a sale of the premises mortgaged, and he then becomes liable only for such deficiency as shall appear on the sheriff's return." (Citing *Biddell v. Brizzolara*, *supra*.)

In the case of *Barbieri v. Ramelli*, 84 Cal. 154, the action was at law on a promissory note. The note, in fact, was secured by a junior mortgage, there being other mortgages on the same premises. The court below found that the mortgage was valueless as a security to plaintiff—that is to say, that the market value of the land and improvements put on it by defendants since their purchase was not equal in amount to the sums due on the indebtedness secured by the prior mortgages, and gave judgment for plaintiff.

Defendant claimed on appeal that the action could not be maintained because prohibited by section 726 of the Code of Civil Procedure, and this court held the point to be well taken. The opinion reiterates the position taken in previous decisions *supra*, and holds "that the plaintiff is bound by the law to pursue the remedy pointed out by the statute," and it further holds that "the plaintiff is not authorized to waive the security and bring an action on the indebtedness, and the court erred in so holding as it did in effect, and rendering judgment for plaintiff." It further points out that it was not intended to be intimated in

Bartlett v. Cottle, supra, that where the security is valueless an action might be brought on the indebtedness alone. Mr. Justice McFarland concurred on the ground that the rule is settled in this state "that an independent action cannot be maintained on a debt secured by mortgage without foreclosing the mortgage," although he adds, "If the question were an open one, I would come to a different conclusion."

The question having arisen so often and in so many different forms, there remains no doubt as to how the rule stands in this state.

2. But the appellant bank claims the right to set off the amount due on the notes given by Schwickert against the assigned demand, under section 438 of the Code of Civil Procedure.

The contention is, that under this section, in an action on a contract, the defendant may set up any cause of action arising upon contract by way of counterclaim, and that counterclaim under the code includes both recoupment and setoff. *St. Louis Nat. Bank v. Gay*, 101 Cal. 286, is cited. That is an instructive case upon the law of counterclaim, but it is not authority or in point in a case like the one here.

The case of *Richmond v. Lattin*, 64 Cal. 273, is cited. In that case plaintiff sued to foreclose a mortgage given to secure a note for one thousand dollars. Defendant set up the defense that after executing the mortgage the defendant sold to plaintiff an interest in a certain patent right for the consideration of two thousand dollars, of which one thousand dollars were to be applied in satisfaction of the mortgage and payment of the note given by defendant to plaintiff, and the remaining one thousand dollars were to be paid in a specified time; that plaintiff had refused to cancel the mortgage or pay the other one thousand dollars. The court held that the affirmative relief asked by defendant as to the one thousand dollars was sufficiently stated as a counterclaim. Appellant apparently reasons that if this be true the converse must be also true, and that a mortgage may be pleaded as a setoff or counterclaim to an action such as this. Whether in an action at law on contract the defendant may plead a note and mortgage executed by plaintiff, and ask its foreclosure by way of setoff, raises a question not raised here and

need not be considered. Appellant in its prayer asks that respondent's claim be deemed compensated by appellant's claim—practically that it be credited on the mortgage note of appellant and appellant be left to pursue its foreclosure suit on the other side of the court.

Appellant contends that there is no reason why a demand secured by a mortgage may not be set off against an unsecured demand, and cites *Cattel v. Warwick*, 6 N. J. L. 190. I have examined the case last cited; it does not support respondent's contention. In New Jersey at that time (1822) the mortgagee apparently could sue on the debt, and in this case did so and levied execution on the equity of redemption of the mortgagor, leaving two bonds secured by the mortgage unpaid, and the question was whether, having purchased all the estate of the mortgagor, the land had not become debtor to the money and the remaining bonds or debts extinguished. The court held that these unpaid bonds might be made subject of setoff. Warwick was therefore permitted to introduce them against Cattel's claim.

Appellant cites 22 American and English Encyclopedia of Law, 280, in support of the proposition that a "defendant may set off a secured claim without surrendering the security." The proposition rests upon the case of *Wallace v. Finnegan*, 14 Mich. 170; 90 Am. Dec. 243. Finnegan sued Wallace in assumpsit on the common counts. Wallace pleaded the general issue and gave notice of a setoff, and the case turned upon the rejection of the setoff by the trial court.

The setoff was a note for four hundred and fifty dollars held by Wallace, made by Finnegan, to secure which Finnegan had delivered to Wallace certain collaterals which it was agreed should be returned to Finnegan if he paid this note, and otherwise to become the absolute property of Wallace. These collateral notes were secured by mortgage on real estate. It was held "that a person holding a collateral security is not bound, unless he chooses, to resort to it before suing upon his principal claim. When that claim is satisfied he may be compelled to surrender it as a condition of enforcing his legal demand. Nothing can be set off unless it could be sued upon, and, on the other

hand, any claim coming within the statute can be set off if it could be sued."

It will be seen the case is wholly unlike the one at bar. If the bank had held Schwickert's simple note and held certain other notes of other persons secured by mortgage, and had offered to set off Schwickert's note without surrendering the collaterals, we would have had the Michigan case over again, but the bank offered to set off one of the Schwickert notes, all of which were secured by mortgage. The case is not in point. Appellant cites no case, and I have found none, where a note secured by mortgage was allowed as a setoff to an action at law where such a statute as ours exists. But appellant alleges in its answer, and it is admitted by the demurrer, that it applied the deposit toward the payment of the Schwickert notes before its assignment to plaintiff. It is claimed that it had a right to do this, although the notes were secured by mortgage. This presents a defense, perhaps, in a form not necessarily involving an action or a right of action, but rather as showing no indebtedness of defendant to plaintiff. But does the right of a bank to apply a deposit to the matured indebtedness of the depositor to the bank apply in this state to the case where that indebtedness is secured by mortgage on real estate?

A holds the past due notes and mortgage of B. He learns of a large deposit in C bank to B's credit. A goes to C bank and sells at a discount B's notes and assigns the mortgage. Can C bank apply the deposit to the payment of these notes? And, if he could do so, could not a junior mortgagee of the same property compel the bank to appropriate and apply the deposit, and in that way obtain the benefit of it? Again, B gives his note and mortgage to C bank. He continues doing business with the bank by depositing money and drawing against it; the notes mature, and he continues to deposit money there. Can the bank seize upon a favorable moment when the deposit is large and impound and apply it and pay off the mortgage without B's consent?

As I read the decisions of this court they mean that the mortgagee, whether a banking corporation or a private individual, must first look to the mortgaged premises as constituting the primary fund out of which the debt secured by the mortgage

must be paid (*Porter v. Muller, supra*, and other cases cited); that the security must be first exhausted; if there be a deficiency it may be docketed, but this deficiency judgment does not become a lien on any other real property, and execution will not issue upon it until after the sale under foreclosure. (*Culver v. Rogers*, 28 Cal. 520; *Hibberd v. Smith*, 50 Cal. 511.)

"The liability," as was said in *Biddell v. Brizzolara, supra*, "is contingent on the fact that a sale of the mortgaged premises shall satisfy the debt and costs."

The reason of the rule that gives to banks the right to appropriate a deposit to the payment of the depositor's matured indebtedness does not apply where the bank has security for that indebtedness. The depositor's matured note, payable to the bank, is equivalent to a check drawn by him on the bank, and the right to charge up his note is practically only exercising the right to charge up his checks, for it is a presumption of law that it was his intent to have the note discharged from his deposit; and there is the reciprocal right of the depositor to have his deposit applied to the payment of the note in the event of the bank's insolvency. (*Morse on Banks and Banking*, secs. 557, 560.) But could there be a presumption of such intent when he had secured his note by mortgage?

It seems to me the rule contended for would compel a depositor, who is a borrower, to avoid keeping a credit account with a bank that held his note secured by mortgage; and if he kept his account elsewhere it would be imperiled by a possible transfer of the secured note to the bank where his credits were, and by this short cut payment would be enforced wholly ignoring the mortgage, and I think enlarging the rule above stated to an unauthorized extent. It would also seem but reasonable that, when the legislature declared that there should be but one action to enforce a debt secured by mortgage, it did not mean that payment could be enforced against the consent of the mortgagor by giving a bank the right to enforce payment under a general banker's lien upon some other property, and that, too, without any legal proceedings whatever. The lien given on the mortgaged premises I think was intended to be in lieu and exclusive of all implied liens. I do not see, either, why a bank should be given a right to forcibly, and against the consent of the de-

positor, appropriate his money, when, if it came into court to do so, the action would not lie, and we have seen it would not lie as counterclaim, setoff, or in whatever other form it may be presented.

The difficulty with appellant's argument is that it ignores the force and effect of section 726 of our Code of Civil Procedure. Whether as counterclaim, or setoff, or recoupment, or whatever other form the defense may assume, it is, for the purpose of the defense, an action against the plaintiff *pro tanto*.

"An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense" (Code Civ. Proc., sec. 22); and by section 25, same code, it is said: "A civil action arises out of: 1. An obligation; 2. An injury.

Appellant's defense offered was "an action for the recovery of a debt" which was secured by mortgage, and the Code of Civil Procedure says, section 726, "there can be but one action for the recovery of a debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter." The conclusion is irresistible that appellant had no right to plead its mortgage notes by way of setoff.

3. Nor does section 440 of the Code of Civil Procedure, as appellant claims, give it any right. Cross-demands of contending parties under that section can be deemed compensated, so far as they equal each other, only under such circumstances as that if one party had brought an action against the other a counterclaim could have been set up. But the action of respondent for the deposit, and the right of action of appellant to foreclose its mortgage, are not cross-demands as contemplated by that section. What would be the law if the security had become valueless is not now here a question, and is not decided. There is no allegation or finding that such was the case; all that was alleged was "that the property covered by said mortgage is insufficient to satisfy said debt secured thereby."

It is recommended that the judgment be affirmed.

Belcher, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Henshaw, J., Temple, J., McFarland, J.

Hearing in Bank denied.

[S. F. No. 690. Department One.—September 23, 1897.]

CHRISTIAN H. INGWERSEN, Respondent, v. BRIDGET BARRY, Appellant.

FENCE—NUISANCE—OBSTRUCTION TO LIGHT AND AIR—INJUNCTION.—A fence, erected wholly upon the land of the defendant, is not a division fence within the meaning of the act of March 9, 1885, limiting the height of division fences and partition walls in cities and towns, and an adjoining proprietor cannot enjoin it as a nuisance merely because it obstructs the passage of light and air to his building.

ID.—ANCIENT LIGHTS.—The English doctrine of "ancient lights" does not obtain in this country; and the legislature cannot vest in an adjoining proprietor the right to prevent his neighbor from building upon his own land such structure as he may see fit, provided it is not a nuisance.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

M. Cooney, for Appellant.

J. D. Sullivan, for Respondent.

VAN FLEET, J.—The evidence shows without conflict that the structure which the complaint denominates a fence, and which it is sought to have abated as a nuisance, was erected and stands wholly upon the lot of defendant. In view of that fact, the question much controverted by counsel, whether the evidence sustains the implied finding of the jury that the structure is a fence, is wholly immaterial to the rights of the parties. Whether it was shown to be a fence, or, as contended by defendant, a building erected and used for domestic purposes, the plaintiff established no right to have it abated. The theory upon which plaintiff bases his claim that the structure is a nui-

sance is that it was unlawfully constructed in violation of an act of the legislature passed March 9, 1885, "regulating the height of division fences and partition walls in cities and towns" (Stat. 1885, p. 45), and that it interferes with the comfortable enjoyment of his property by obstructing the access of light and air to the building on his abutting premises.

But, assuming that the structure was properly found to be a fence, it is not within the inhibition of that statute. In the quite recent case of *Western Granite etc. Co. v. Knickerbocker*, 103 Cal. 111, it was held by this court, speaking through Mr. Justice Temple (then commissioner), that that act must be construed as referring only to fences or walls resting upon the division line between adjoining proprietors; that the English doctrine of "ancient lights" does not obtain in this country, and that it was not competent for the legislature to vest in an adjoining proprietor the right to prevent his neighbor from building upon his own land such structure as he may see fit, provided it is not a nuisance; and that it is not a nuisance, merely because it obstructs the passage of light and air to the building of the adjoining owner. Under the principles there announced, which are firmly established by the courts of the United States, and to which we adhere, the plaintiff made no case entitling him to recover.

The judgment and order are reversed.

Garoutte, J., and Harrison, J., concurred.

[Sac. No. 282. Department Two.—September 23, 1897.]

GUY SHIRLEY, Administrator of the Estate of Paul Shirley,
Deceased, Appellant, v. CITY OF BENICIA et al., Respondents.

MUNICIPAL CORPORATIONS—WATER LOTS—WATERFRONT LINE—WHARVES.—

When the state establishes the permanent waterfront or harbor line for one of its municipalities, and authorizes the sale of land lying between such line and the uplands, it is a legislative declaration that these lands may pass into private ownership without interference with the public rights of navigation and fishery. They may then be reclaimed from the waters by their owners and devoted to any of the uses to which uplands are put, or, if suitably located, and there be no restriction in the grant, they may, under legal sanction, be covered with wharves, docks, and like structures.

ID.—RIGHTS OF ABUTTING OWNERS.—It is the owners of land abutting upon the waterfront line who, under legal sanction, may build into the deeper public waters beyond. The owners of inner water lots have not such right.

ID.—BENICIA—ERECTION OF PUBLIC WHARVES ON STREETS.—The city of Benicia, having reserved a strip of land for public streets, between its waterfront line and the lands which it sold into private ownership, has the right, although such streets are covered with water, to convert the same into public wharves, or to build such structures along them or at their termini, and such use is no invasion of the rights of proprietors of abutting lands, lying between the streets and the uplands.

APPEAL from a judgment of the Superior Court of Solano County and from an order denying a new trial. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

George A. Lamont, for Appellant.

Frank M. Stone, and C. P. Stevens, for Respondents.

HENSHAW, J.—Appeals from the judgment and from the order denying plaintiff a new trial.

Benicia is a city of the sixth class. It is situated upon the north shore of the straits of Carquinez, and its boundary upon the south is the middle line of the channel. The state granted to the city the lands under the waters of the straits, within its corporate limits, and authorized the sale of the lands into private

ownership. (Stats. 1855, p. 239; Stats. 1859, p. 315; Stats. 1868, p. 206.) It also defined the permanent waterfront line of the city. (Stats. 1859, p. 315; Stats. 1868, p. 266.) Outside of the waterfront line is a line established by authority of the United States government, and called the pier head line, beyond which the construction of piers and wharves is not permitted. The city mapped and subdivided its submerged lands within the waterfront line into streets, blocks, and lots, and sold them in parcels to purchasers. Plaintiff became the owner of an undivided interest in certain of these lots. As described in the complaint, they are covered by waters and "bounded on the north by Water street, on the west by First street, on the south by Front street, and on the east by the permanent waterfront of the city." There was upon plaintiff's property a ferry slip opening onto the eastern waterfront.

Upon the south of the property the waterfront line followed the south line of Front street, which street is sixty feet wide. There is thus in this direction a public highway sixty feet in width between plaintiff's property and the waterfront line. Upon the west of the property is First street, eighty feet wide, extending from the shore into deep water beyond plaintiff's lands.

The city constructed a wharf upon the line of First street, thus interfering with the free access by water to plaintiff's lands from the west, and at the end of the wharf beyond the line of the waterfront erected a pier head extending for a considerable distance along the southerly frontage of the lands, but distant therefrom more than the width of Front street, which intervened.

The city of Benicia, it is conceded, is authorized by its charter to erect and maintain wharves and similar structures. Its privilege in this regard, however, is not exclusive, but may be enjoyed by other owners of suitable lands.

Plaintiff prosecuted this action to abate the city's wharf as a nuisance, or to obtain damages for the injury it occasioned his property. The findings and judgment of the trial court were adverse to him.

Over none of the foregoing facts is there the slightest dispute. Yet in and of themselves they are determinative of the controversy.

When the state establishes the permanent waterfront or harbor line for one of its municipalities, and authorizes the sale of lands lying between such line and the uplands, it is a legislative declaration that these lands may pass into private ownership without interference with the public rights of navigation and fishery. They may then be reclaimed from the waters by their owners and devoted to any one of the infinity of uses to which uplands are put, or, if suitably located, and there be no restriction in the grant, they may, under legal sanction, be covered with wharves, docks, and like structures. In this the action of the state with regard to the water lots of the city of San Francisco forms a typical and conspicuous example which has so recently been used in illustration that it is necessary only to refer to the case of *Oakland v. Water Front Co.*, ante, p. 160.

But it is the owners of land abutting upon the waterfront line who, under legal sanction, may thus build into the deeper public waters beyond. The owners of the inner water lots do not enjoy this right by virtue of their holding more than do the owners of the uplands. Their right of access to navigable waters or to the uplands is by the streets, and this right they enjoy with the whole public.

The city of Benicia, it is seen, reserved from sale and held for public use much of this land in the form of streets. In particular it was careful to preserve a strip of land sixty feet in width, between the waterfront line and the lands which it sold into private ownership. These streets are covered by water, it is true, but where legislative authority exists, it is not to be questioned that the streets themselves may be converted into public wharves or such structures may be built along them or at their termini. And this use is no invasion of the rights of the proprietors of abutting lands. (Dillon on Municipal Corporations, 4th ed., sec. 110; *Backus v. Detroit*, 49 Mich. 110; 43 Am. Rep. 447; *Haight v. Keokuk*, 4 Iowa, 199; *McMurray v. Baltimore*, 54 Ind. 103; *Mayor v. Morris Canal Co.*, 12 N. J. Eq. 547; *Lansing v. Smith*, 8 Cow. 146.)

Thus the city of Benicia was exercising an undoubted right in constructing its wharf, and any detriment which plaintiff's property may have suffered thereby is in no sense a legal taking or im-

pairment of it. As well might one who had acquired property upon the line of a street dedicated to the public, but not yet used, complain of injury when in due course of time the authorities opened it to public travel.

Shirley v. Bishop, 67 Cal. 543, upon which appellant relies, so far from conflicting with these views, is authority to support them. The litigation there affected these same lands, but the city was then constructing a wharf interfering with the eastern access to plaintiff's property where it abuts upon the harbor line. It was decided that the owner of land, the boundary of which forms part of the permanent waterfront, has a vested right of access to the navigable waters of which he cannot be deprived without compensation.

The judgment and order appealed from are affirmed.

McFarland, J., and Temple, J., concurred.

[S. F. No. 98. In Bank.—September 23, 1897.]

In the Matter of the Estate of THOMAS H. BLYTHE, Deceased. HENRY T. BLYTHE et al., Appellants, v. FLORENCE BLYTHE HINCKLEY, Respondent.

MANDATE FROM SUPREME COURT OF THE UNITED STATES—PRACTICE—STRIKING OUT USELESS ORDER.—The action of this court, upon the presentation of a writ of mandate from the supreme court of the United States, is limited by the directions found in the writ; and where the mandate contains no reference to the affirmation of the judgment theretofore rendered by this court in the cause therein specified, it is useless for the court to reaffirm its order of judgment, and an order reaffirming it will be stricken from the record.

MOTION in the Supreme Court to strike out an order entered upon receipt of a mandate from the Supreme Court of the United States.

The facts are stated in the opinion of the court.

S. W. & E. B. Holladay, for Appellants.

W. H. H. Hart, for Respondent.

THE COURT.—The Supreme Court of the United States issued a mandate to this court in the matter of the estate of Thomas H. Blythe, deceased. That mandate recited: "And whereas in the present term of October, in the year of our Lord one thousand eight hundred and ninety-six, the said cause came on to be heard before the supreme court of the United States on the said transcript of record, and on motions to dismiss or to affirm, which were argued by counsel, on consideration whereof it is now here ordered and adjudged by this court that the writ of error in this cause be, and the same is hereby, dismissed for the want of jurisdiction; and that the said appellee, Florence Blythe Hinckley, recover against the said appellants fourteen dollars and seventy-five cents, for her costs herein expended, and have execution therefor, May 24, 1897. And the same is hereby remanded to you, the said judges of the said supreme court of the state of California, in order that such execution and proceedings may be had in the said cause in conformity with the judgment and decree of this court above stated, as according to right and justice," etc.

Upon the presentation of the aforesaid mandate to this court, it was ordered that it be filed, and that a judgment for costs, as therein specified, be entered. An additional entry was made upon the records of this court in the following words: "It is further ordered that the judgment heretofore rendered by this court on November 30, 1895, be and the same is hereby affirmed." The attorneys of Henry T. Blythe *et al.* now move to strike these words from the record, upon the ground that such entry was made unadvisedly and without legal justification.

The motion made by Henry T. Blythe *et al.* to strike from the record the aforesaid entry must be granted. While the practice of this court in the past has in some instances been similar to that followed in the present case, still we see no reason for it, and find no authority authorizing it. The action of this court upon the presentation of a writ of mandate from the Supreme Court of the United States is limited by the direction found in that writ. In this case the mandate contains no reference to the affirmation of the judgment heretofore rendered by this court in the matter of the estate of Blythe, deceased. In the absence

of such mandate it would be useless for this court to reaffirm its own judgment. Therefore the order made was not justified, and should be stricken from the record.

It is so ordered.

Beatty, C. J., and Harrison, J., being disqualified, did not participate in the foregoing opinion.

[Crim. No. 209. In Bank.—September 23. 1897.]

THE PEOPLE, Respondent, v. CASS COLVIN, Appellant.

CRIMINAL LAW—HOMICIDE—EVIDENCE—PREVIOUS TROUBLE—TENDENCY TO DISGRACE DEFENDANT.—Upon the trial of a defendant charged with murder, the prosecution is entitled to show any previous difficulties or troubles that had arisen between the defendant and the deceased, in order to indicate the state of mind of the defendant at the time of the killing. This showing is not limited to physical encounters, but may consist solely in an affray of words; and this character of evidence is admissible, however much it may tend to disgrace and injure the defendant in the estimation of the jury.

ID.—GENERAL STATEMENT OF NATURE OF TROUBLE—MATTER OF DETAIL—MOTION TO STRIKE OUT—IMPROPER OBJECTION.—A witness may be properly asked to make a general statement of the nature of any preceding trouble between the defendant and the deceased; but the location of the right or wrong of the trouble is immaterial, and the evidence should not be introduced in detail; yet, if the answer of the witness includes any objectionable matter of detail, the wrong can only be remedied by a motion to strike it out, and, if no such motion is made, the evidence cannot properly be objected to on the ground that it tends to disgrace and injure the defendant in the estimation of the jury.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. J. R. Webb, Judge.

The facts are stated in the opinion of the court.

Walter D. Tupper, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

GAROUTTE, J.—Defendant appeals from a judgment rendered against him, and also from an order denying his motion

for a new trial. He has been convicted of the crime of murder, and sentenced to life imprisonment. The grounds relied upon for reversal of the judgment and new trial are few, and not of serious importance.

The defendant and the deceased had been working at a logging camp. The defendant, with his valise in his hand, preparatory to leaving the camp, passed the house where deceased and his wife, who was a sister of defendant, were living. The sister appeared at the door as defendant was passing by and said: "Cass, this is the third time you are leaving; if I was you, I would stay." This remark precipitated the trouble which resulted in the death of the woman's husband a few minutes thereafter. As a witness for the prosecution she testified that she made the foregoing remark. Upon cross-examination defendant's attorney asked:

"Q. Why did you speak to him? A. I was glad he was leaving the camp.

"Q. Well, what was your reason, then, for speaking to him, telling him you hoped he would stay away? A. Well, we would not have quite so much trouble on our hands, is why I was glad."

In redirect examination by the prosecution the following occurred:

"Q. Why was you glad he was leaving the camp? A. Well, so that we would not have so much trouble on our hands.

"Q. Well, then, if you said to Mr. Tupper you would have less trouble, I want you to explain to the jury what you meant by trouble—what trouble? A. He drank. He would spend all of what he made, and we helped him along as much as we could, and his wife would come and tell us things he would do, and then she would go back and say things that I would say, when I never said a word of harm of my brother, and that kept him so he done what he done."

This evidence of the witness came before the jury under defendant's objection. It is now claimed by the defendant that it tended to degrade and injure him in the minds of the jury, and therefore was prejudicial to his rights. Conceding the evidence had the tendency claimed for it, still, if it was competent for any purpose, its tendency to prejudice the minds of the jury against the defendant would be no reason to deny its admission

as evidence. Defendant's counsel drew from the witness that "trouble" had previously arisen between the defendant and herself and husband. Thereupon arose the inquiry upon the part of the prosecution, What was this trouble? Such an inquiry was clearly proper. It would have been proper upon the part of the prosecution in establishing its case in chief to have proven previous trouble between these parties, for the purpose of showing the existence of malice in the heart of the defendant when the killing took place. Such being the fact, it was certainly entirely proper for the prosecution to examine into the question, when it had already been touched upon by the defense. If the inquiry addressed to the woman as to the nature of this trouble to which she referred had developed the fact that a physical encounter had at some time in the past taken place between these men, the competency and admissibility of such evidence could not be questioned for a moment. Such being the rule of law, it is evident that the question asked was entirely proper. If it be conceded, for present purposes only, that the answer went too far and entered too much into detail, then defendant's remedy was by motion to strike out, and an exception to the ruling of the court in allowing the question would not meet the difficulty. To indicate the state of mind of the defendant at the time of the killing the prosecution is always entitled to show any previous difficulties or troubles that have arisen between the parties, and this showing is not limited to physical encounters, but may consist solely in an affray of words; and this character of evidence is admissible, however much it may tend to disgrace and injure the defendant in the estimation of the jury. An objection to its admission upon such ground is not at all tenable. At the same time this character of evidence may not be introduced in detail. The location of the right or the wrong of the previous trouble is immaterial. As was said in *People v. Thomson*, 92 Cal. 512: "For the purpose of showing malice on the part of the defendant, the prosecution is entitled to prove that the parties to the homicide had had difficulties upon previous occasions. These matters may be shown in a general way, and it is not proper to enter into an examination of them in detail for the purpose of determining which of the parties was in the wrong." In this view of the case, if the answer of the witness included any objec-

tionable matter, the wrong could only be reached by motion to strike out, and such motion was not made.

We find no error in the law given to the jury by the court. The instruction bearing upon the question of mutual combat is supported by *People v. Hecker*, 109 Cal. 462. The instruction as to the manner of weighing the testimony of a witness false in part finds full support in *People v. Treadwell*, 69 Cal. 226. The instruction as to self-defense, which was refused, was substantially given in the charge of the court.

For the foregoing reasons the judgment and order are affirmed.

Van Fleet, J., Harrison, J., McFarland, J., Henshaw, J., and Temple, J., concurred.

[S. F. No. 677. Department Two.—September 23, 1897.]

H. B. MEYERS et al., Respondents, v. R. P. MERILLION,
Appellant.

ACTION TO ENJOIN BREACH OF CONTRACT—SALE OF BUSINESS AND GOODWILL BY RETIRING PARTNER—AGREEMENT NOT TO COMPETE—CROSS-COMPLAINT—DEMURRER—FRAUD—CONCEALMENT OF COMBINATION—TRUST AND MONOPOLY—RESCISSION.—In an action brought by the members of a succeeding firm to enjoin a breach of a contract made by the retiring partner of a former firm upon the sale of his interest in the partnership property and goodwill of the business to his copartner, one of the plaintiffs, in which he agreed that he would not establish, carry on, or conduct or maintain or act as agent for a like business, within the city and county, for a period of three years, a cross-complaint charging fraud in such sale committed by the purchasing partner, in the concealment of a combination, trust, and monopoly of the business effected by him with the other plaintiffs prior to the sale, which enhanced the value of the interest sold to the extent of seven thousand five hundred dollars, that the plaintiff thereby received more money for the partnership property when conveyed to the combination than he could otherwise obtain, and that all of the plaintiffs were aware of and took part in the fraud practiced upon cross-complainant, and praying for a rescission of the sale, and restitution of his rights as a partner in the former firm, and for the appointment of a receiver of the partnership property, is insufficient, and states no ground for relief, and a general demurrer thereto is properly sustained.

ID.—ILLEGALITY OF TRUSTS AND MONOPOLIES—SHARE IN GAINS NOT RECOVERABLE—INSUFFICIENT PLEADING.—Trusts and monopolies which design to control the prices of commodities are illegal as restraining freedom of trade, and destroying competition; and a pleading which seeks to

share in the gains of an illegal trust and monopoly by averring that property sold by the pleader was enhanced in value by reason of the existence thereof, and that the pleader was deprived of such enhanced value by fraudulent concealment thereof by the purchaser, is devoid of merit, either as a ground of defense or of affirmative relief.

ID.—PARTICIPATION BY PLAINTIFFS OWING NO DUTY TO DEFENDANT—IMPROPER CHARGE OF FRAUD.—The formation by defendant's former partner of a combination to control business and increase prices, made with the other plaintiffs, who owed no duty to the defendant, and were not bound to disclose to him any of their present or prospective business ventures, cannot justify a charge that the other plaintiffs participated in the alleged fraud of such former partner, in concealing the existence of such combination, and such charge, as against them, falls to the ground of its own weight.

ID.—RIGHTS OF THIRD PARTIES—RESCISSION NOT PERMISSIBLE—DAMAGES FOR FRAUD.—Where the rights of third parties have intervened, and the circumstances of the parties to an alleged fraud have so far changed that rescission therefor may not be decreed without injury to such third parties and to their rights, rescission will be denied, and the complaining party left to his action at law for damages for the fraud.

ID.—SALE OF GOODWILL OF BUSINESS—CONTRACT IN RESTRAINT OF TRADE—INHIBITION AS TO AGENCY—CONSTRUCTION OF CODE.—An inhibition as to agency for others in a contract by one who has sold the goodwill of a business, engaging not to carry on a like business, or to act as agent in so doing, is within the provision of the code permitting a contract in restraint of trade to go to the carrying on of a similar business in such case; and the language of the code is to receive a reasonable construction, so as to effect the end for which the legislature says such contracts may be made, and to give reasonable protection to him in whose favor such a contract is executed, and the code provision as to the carrying on of a similar business is not to be limited to the carrying of it on as owner or proprietor, but is equally inclusive of the conduct of it, wholly or in part, as the agent of another.

ID.—CONSTRUCTION OF CONTRACT AND DECREE AS TO AGENCY—CONDUCT OF BUSINESS AS AGENT.—An inhibition of agency in a contract not to establish, carry on, conduct, or maintain a rival business, or act as agent therefor, for a period of three years, and a decree enforcing such contract according to its terms, are to be construed as prohibiting only an agency wholly or partially for the conduct of the business, and not as prohibiting employment as a mere servant or clerk, though such employment may fall within the more enlarged meaning of agency as a general term.

ID.—INJUNCTION—FORM OF DECREE.—A decree enjoining breach of such contract should not purport to enjoin the carrying on of the rival business for the space of three years from the date of the contract, "or so long as plaintiffs, or any one deriving title to the goodwill of the business, carry on said business," but it should read: "So long as plaintiffs, or any one deriving title to their business, shall carry on said business, not exceeding three years," from the date of the contract.

ID.—SUCCESSION TO GOODWILL OF BUSINESS—DENIAL IN ANSWER—DENURER—ADMISSION IN CROSS-COMPLAINT NOT A WAIVER.—A denial in the answer
CXVIII CAL.—23

tionable matter, the wrong could only be reached by motion to strike out, and such motion was not made.

We find no error in the law given to the jury by the court. The instruction bearing upon the question of mutual combat is supported by *People v. Hecker*, 109 Cal. 462. The instruction as to the manner of weighing the testimony of a witness false in part finds full support in *People v. Treadwell*, 69 Cal. 226. The instruction as to self-defense, which was refused, was substantially given in the charge of the court.

For the foregoing reasons the judgment and order are affirmed.

Van Fleet, J., Harrison, J., McFarland, J., Henshaw, J., and Temple, J., concurred.

[S. F. No. 677. Department Two.—September 23, 1897.]

H. B. MEYERS et al., Respondents, v. R. P. MERILLION,
Appellant.

ACTION TO ENJOIN BREACH OF CONTRACT—SALE OF BUSINESS AND GOODWILL BY RETIRING PARTNER—AGREEMENT NOT TO COMPETE—CROSS-COMPLAINT—DEMURRER—FRAUD—CONCEALMENT OF COMBINATION—TRUST AND MONOPOLY—RESCISSON.—In an action brought by the members of a succeeding firm to enjoin a breach of a contract made by the retiring partner of a former firm upon the sale of his interest in the partnership property and goodwill of the business to his copartner, one of the plaintiffs, in which he agreed that he would not establish, carry on, or conduct or maintain or act as agent for a like business, within the city and county, for a period of three years, a cross-complaint charging fraud in such sale committed by the purchasing partner, in the concealment of a combination, trust, and monopoly of the business effected by him with the other plaintiffs prior to the sale, which enhanced the value of the interest sold to the extent of seven thousand five hundred dollars, that the plaintiff thereby received more money for the partnership property when conveyed to the combination than he could otherwise obtain, and that all of the plaintiffs were aware of and took part in the fraud practiced upon cross-complainant, and praying for a rescission of the sale, and restitution of his rights as a partner in the former firm, and for the appointment of a receiver of the partnership property, is insufficient, and states no ground for relief, and a general demurrer thereto is properly sustained.

ID.—ILLEGALITY OF TRUSTS AND MONOPOLIES—SHARE IN GAINS NOT RECOVERABLE—INSUFFICIENT PLEADING.—Trusts and monopolies which design to control the prices of commodities are illegal as restraining freedom of trade, and destroying competition; and a pleading which seeks to

share in the gains of an illegal trust and monopoly by averring that property sold by the pleader was enhanced in value by reason of the existence thereof, and that the pleader was deprived of such enhanced value by fraudulent concealment thereof by the purchaser, is devoid of merit, either as a ground of defense or of affirmative relief.

ID.—PARTICIPATION BY PLAINTIFFS OWING NO DUTY TO DEFENDANT—IMPROPER CHARGE OF FRAUD.—The formation by defendant's former partner of a combination to control business and increase prices, made with the other plaintiffs, who owed no duty to the defendant, and were not bound to disclose to him any of their present or prospective business ventures, cannot justify a charge that the other plaintiffs participated in the alleged fraud of such former partner, in concealing the existence of such combination, and such charge, as against them, falls to the ground of its own weight.

ID.—RIGHTS OF THIRD PARTIES—RESCISSION NOT PERMISSIBLE—DAMAGES FOR FRAUD.—Where the rights of third parties have intervened, and the circumstances of the parties to an alleged fraud have so far changed that rescission therefor may not be decreed without injury to such third parties and to their rights, rescission will be denied, and the complaining party left to his action at law for damages for the fraud.

ID.—SALE OF GOODWILL OF BUSINESS—CONTRACT IN RESTRAINT OF TRADE—INHIBITION AS TO AGENCY—CONSTRUCTION OF CODE.—An inhibition as to agency for others in a contract by one who has sold the goodwill of a business, engaging not to carry on a like business, or to act as agent in so doing, is within the provision of the code permitting a contract in restraint of trade to go to the carrying on of a similar business in such case; and the language of the code is to receive a reasonable construction, so as to effect the end for which the legislature says such contracts may be made, and to give reasonable protection to him in whose favor such a contract is executed, and the code provision as to the carrying on of a similar business is not to be limited to the carrying of it on as owner or proprietor, but is equally inclusive of the conduct of it, wholly or in part, as the agent of another.

ID.—CONSTRUCTION OF CONTRACT AND DECREE AS TO AGENCY—CONDUCT OF BUSINESS AS AGENT.—An inhibition of agency in a contract not to establish, carry on, conduct, or maintain a rival business, or act as agent therefor, for a period of three years, and a decree enforcing such contract according to its terms, are to be construed as prohibiting only an agency wholly or partially for the conduct of the business, and not as prohibiting employment as a mere servant or clerk, though such employment may fall within the more enlarged meaning of agency as a general term.

ID.—INJUNCTION—FORM OF DECREE.—A decree enjoining breach of such contract should not purport to enjoin the carrying on of the rival business for the space of three years from the date of the contract, "or so long as plaintiffs, or any one deriving title to the goodwill of the business, carry on said business," but it should read: "So long as plaintiffs, or any one deriving title to their business, shall carry on said business, not exceeding three years," from the date of the contract.

ID.—SUCCESSION TO GOODWILL OF BUSINESS—DENIAL IN ANSWER—DEMURRER—ADMISSION IN CROSS-COMPLAINT NOT A WAIVER.—A denial in the answer

CXVIII CAL.—23

of an averment in the complaint that plaintiffs had succeeded to the goodwill of the business sold by the defendant to his copartners, presents an issue material to plaintiffs' cause of action for breach of defendant's contract not to carry on a rival business, nor is the denial in the answer waived or overcome by an averment of that fact in defendant's cross-complaint; and it is error to sustain a demurrer to such answer.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Thomas F. Barry, for Appellant.

Daniel Titus, for Respondents.

HENSHAW, J.—Plaintiffs averred that they are copartners engaged in the business of box manufacturing. In October, 1895, the then existing firm of Meyers, Merillion & Co. was engaged in the same business. The latter firm consisted of the plaintiff Meyers and the defendant Merillion. By agreement of the partners this firm was dissolved, Meyers buying Merillion's interest in the property and in the goodwill of the business under a written agreement in part as follows: "And in consideration of the payment to me of the foregoing sum, and as part of the consideration for such payment, I do hereby agree with the party of the second part that I will not establish, carry on, conduct, or maintain a box business in the city and county of San Francisco, California, or act as agent, for the period of three years from and after the date of these presents."

Thereafter plaintiffs entered into partnership and became and are the successors in interest in the business and goodwill of the firm of Meyers, Merillion & Co. Notwithstanding his agreement, defendant is engaged in erecting a box factory in the city of San Francisco, and, unless restrained, will engage in the business of manufacturing and selling boxes. The prayer asked for an injunction.

Defendant met this pleading by answer and cross-complaint. In his answer, after certain denials, he set up fraud in avoidance of his contract. By his cross-complaint he charged the same matters of fraud by reason of which he was induced to part with his interest in the partnership and goodwill of the business for

the sum of seventeen thousand five hundred dollars, when the true value of his interest at the time was twenty-five thousand dollars. He prayed for a decree in rescission, for a receiver, and for a re-establishment of himself as a partner upon return of the seventeen thousand five hundred dollars.

The court sustained general demurrers, both to the answer and to the cross-complaint, and upon entry of its decree for plaintiffs defendant appealed.

The fraud charged is as follows: Before the date of defendant's sale of his interest his partner, plaintiff Meyers, had been negotiating with Williams and Carrick (who at that time were partners engaged in a like business,) to effect "a trust, combine, and monopoly of the business in the city and county of San Francisco." He did effect this trust, combine, and monopoly before the date of the sale and dissolution, but concealed the fact from defendant. Because of the combine, trust, and monopoly defendant's interest was worth twenty-five thousand dollars instead of seventeen thousand five hundred dollars. "In pursuance of the said fraud, conspiracy, trust, and combine" the copartnership of plaintiffs was formed, and by reason of the fraud and combine, trust, and monopoly, Meyers received more money for the partnership property of Meyers, Merillion & Co. when conveyed to the combine than he could otherwise have obtained. "Plaintiffs Carrick and Williams were well aware of and took part in the fraud practiced upon cross-complainant."

Upon such charges of fraud it is at once apparent that the demurrer to the cross-complaint was properly sustained. Merillion's pleading admits that he received full value for his property, saving as that value was enhanced by an unlawful conspiracy between the plaintiffs to effect a combine, trust, and monopoly of the business. His request, then, simply is that he should be allowed to share the spoils garnered under this unholy alliance. The merits of this claim are no better than they would be had he averred that these plaintiffs designed to steal and use some valuable patent, and, having succeeded in the theft, had thus greatly increased the value of the business, in which increase of value he was entitled to share because his former partner was in the conspiracy. Appellant does not contend that trusts and monopolies which design to control the prices of commodities

are not illegal as restraining freedom of trade and destroying competition (*Mill and Lumber Co. v. Hayes*, 76 Cal. 387; *Vulcan Powder Co. v. Powder Co.*, 96 Cal. 510), but he insists that the combine here pleaded is such as was declared legal in *Herriman v. Menzies*, 115 Cal. 16. The cases are in all essentials dissimilar. In the *Menzies* case it was held that the contract was not illegal, for it was not shown that it was designed to or did effect a control of business to an extent enabling the contracting firms to exclude competition or control the prices of the commodity. In the present case it is averred that the parties "effected a combine, trust and monopoly." A monopoly is discussed and defined in the *Menzies* case; so what is here pleaded is not only an illegal contract for a monopoly, but the successful operation of the illegal monopoly itself.

But there are other and independent considerations equally destructive of appellant's right to prosecute this cross-complaint. The charge is the formation by his partner of a combine with Williams and Carrick to control business and increase prices, and the fraud consists in the concealment by the partner of a fact within his knowledge, which in good faith he was bound to disclose, and which enhanced the value of Merillion's interest. It is charged that all three participated in the fraud. How Williams and Carrick could have done so is not made to appear. They were not partners of defendant. They owed him no duty. They certainly were not bound to disclose to him any of their present or prospective business ventures. So far as the charge of fraud against them is concerned, it falls to the ground of its own weight. (*Russell v. Clark*, 7 Cranch, 92.) Where the rights of others have intervened, and the circumstances have so far changed that rescission may not be decreed without injury to those parties and their rights, rescission will be denied and the complaining party left to his action at law for damages for the fraud. (Story on Contracts, sec. 977; Bishop on Contracts, sec. 679; 2 Parsons on Contracts, 782; Beach on Contracts, sec. 789, et seq; Pomeroy's Equity Jurisprudence, secs. 221, 303, 914, 1363, 1377; *Mackintosh v. Tracy*, 4 Brewst. 59.)

Here Merillion asks that a new partnership, of which he was never a member, and which contains at least two members

against whom he has no legal grievance, should be dissolved and its property turned over to a receiver in order that a defunct partnership may be revived and he be restored to his former position in it. Equity would be slow to grant such relief, particularly under a pleading which shows that full and adequate redress may be obtained at law, for defendant explicitly avers that by reason of the fraud his partner induced him to part with property worth twenty-five thousand dollars for the sum of seventeen thousand five hundred dollars. The difference, seven thousand five hundred dollars, is then the amount of his damage. If he has a cause of action it is against Meyers alone, and he can be adequately compensated in an action at law based on the fraud and claiming damages in the sum named.

The charges of fraud in the answer being the same as those we have been considering, it follows that they were not in that pleading sufficient to constitute a defense.

There is left for consideration certain legal objections urged to the validity of the contract and of the decree based upon its terms. Upon this subject the first point of attack is against the language of the contract carried into the decree by which defendant engages not to carry on a like business, or to act as agent for any one so doing. It is contended that the inhibition as to agency is without the provisions of the code which permit a contract in restraint of trade to go only to the conduct of a similar business. (Civ. Code, secs. 1673-75.) But the language of the code is to receive a reasonable construction so as to effect the end for which the legislature says such contracts may be made, and to give reasonable protection to him in whose favor such a contract is executed. In High on Injunctions, section 1177, it is said: "Where, however, one agrees that he will not directly or indirectly, either alone or in partnership, with or without the assistance of any other person, set up or follow or practice a particular business, he is regarded as violating his covenant by conducting the business in the capacity of assistant or manager to another person." And this proposition will be found fully supported by the authorities.

While contracts of this nature receive strict construction, yet in construing them their legitimate aim and end are not to be lost sight of. They are designed to secure to the business of one

person immunity from rivalry and consequent damage at the hands of another who would be a dangerous competitor by reason of his skill, energy, and popularity. The provisions of the code authorize the execution of a contract by which one agrees not "to carry on" a similar business. It is too narrow a construction to say that this is limited to the carrying on of a business as owner or proprietor. To conduct, manage, or operate it wholly or in part, as the agent of another, is equally within the purpose of the law and the language of the code. By the terms of this contract defendant covenanted not to establish, carry on, conduct, or manage a similar business, either for himself, or as agent for another. It is true that agency is a general term, and that servants and clerks are agents of their employers. But criticism of this contract may not be justified on this account. For it clearly appears that the inhibited agency is an agency wholly or partially for the *conduct* of the business. So understood and so limited in the decree, there is nothing obnoxious to the law in the terms of this contract, a declaration which the following cases will serve to illustrate: *Turner v. Evans*, 2 De Gex, M. & G. 740; *Jones v. Havens*, 4 Ch. Div. 636; *Turner v. Evans*, 2 El. & B. 511; *Finger v. Hahn*, 42 N. J. Eq. 606; *Dalls v. Weaver*, 11 Week. Rep. 993.

The decree enjoins defendant "for the space of three years from the eighth day of October, 1895, or so long as plaintiffs, or anyone deriving title to the goodwill of their business, carry on said business." It should read: "So long as plaintiffs, or anyone deriving title to their business, shall carry on said business, not exceeding three years from the eighth day of October." (*City Carpet Beating etc. Works v. Jones*, 102 Cal. 506.)

One other point demands consideration. In his answer defendant denied that the plaintiffs had succeeded to the interest in the goodwill of the business which had passed to Meyers. The establishment of this fact was material to plaintiff's cause of action, for, if they had not so succeeded, this was a perfect defense to their action. Issue being joined upon this material averment, it was error for the court to sustain the general demurrer upon the ground that the answer pleaded no defense. It is not improbable that the trial court was misled by an averment in the cross-complaint of the existence of this very partnership of

plaintiffs as the successor to the interest of Meyers, but this averment, though inconsistent with the denial of the answer, cannot be used to destroy its effect. As in separate defenses a denial in one is not waived by an admission of the same matter in another (*Billings v. Drew*, 52 Cal. 565; *Miles v. Woodward*, 115 Cal. 308), so here the denial of the answer is not waived or overcome by an averment in the cross-complaint of substantially the same facts as those which the answer denies.

For this reason, therefore, the judgment must be reversed.

It is, therefore, ordered that the judgment entered upon demurrer to the cross-complaint be affirmed, and that the judgment upon demurrer to the answer be reversed, and the cause remanded, with directions to the court to overrule that demurrer and proceed to trial upon the single issue above indicated.

Temple, J., and McFarland, J., concurred.

[Crim. No. 297. Department One.—September 25, 1897.]

THE PEOPLE, Respondent, v. GRAY G. SOUTHERN, Appellant.

CRIMINAL LAW—BILL OF EXCEPTIONS—CORRECTION OF MISTAKE—NOTICE—ORDER SETTING ASIDE SETTLEMENT—APPEAL.—Under section 473 of the Code of Civil Procedure, notice is not required to be given of an application for the correction of a mistake in a record; nor is the presence of a defendant convicted of felony needed at the hearing of a motion to correct a mistake in the settled bill of exceptions, so as to make it show the record as it actually existed; and where the defendant was given two days' notice of such motion, and the court, after the taking of evidence which justified the correction of a mistake in the bill, set aside the order settling the bill, corrected the mistake, and resettled the bill as corrected, the order setting aside the settlement will not be reversed upon appeal for the want of five days' notice to the defendant of the hearing.

APPEAL from an order of the Superior Court of Orange County setting aside an order settling a bill of exceptions. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

C. S. McKelvey, and Brosseau & Montgomery, and McKelvey & Bowes, for Appellant.

W. F. Fitzgerald, Attorney General, and C. N. Post, Deputy Attorney General, for Respondent.

THE COURT.—The trial court set aside an order settling a bill of exceptions, made a correction in the bill, and thereupon again settled the same. This appeal is prosecuted from the order setting aside the order settling the bill. The defendant was convicted of a felony, and thereafter prepared and had settled a bill of exceptions. This bill contained an instruction upon the law of reasonable doubt in which the verb "can say" is found. It was claimed by the prosecution that the language of the instruction as given to the jury was "cannot say." Upon proceedings had the order settling the bill was set aside and the word "not" inserted therein. This action of the trial court was taken upon two days' notice to the other side, and after the taking of evidence.

Defendant's main contention is, that he was entitled to five days' notice of the hearing. He makes no claim that injury resulted to him by reason of the shortness of the notice given, but stands squarely upon his strict legal rights as he understands them. He has no such legal rights. It was a commendable practice upon the part of the other side to give him notice of this hearing, but in a case like the present we find nothing in the statute requiring notice. The proceeding inaugurated for the correction of the bill was simply to rectify a mistake—to make the bill show the record as it actually existed. The course here adopted was in full accord with the practice recognized by section 473 of the Code of Civil Procedure, and by that section no notice whatever is contemplated in the correction of a mistake. *Warner v. Thomas etc. Works*, 105 Cal. 409, fully and clearly declares the principle governing trial courts under such contingencies as are here presented. (See, also, *Crim v. Kessing*, 89 Cal. 478; 23 Am. St. Rep. 491.)

The presence of the defendant was not needed at the hearing of this motion, and the evidence presented at the hearing fully justified the trial court in making the order appealed from.

For the foregoing reasons the order is affirmed.

[Sac. No. 182. Department One.—September 25, 1897.]

COUNTY OF TULARE, Respondent, v. E. M. JEFFERDS, as
Auditor, etc., Appellant.

COUNTY GOVERNMENT ACT—COMPENSATION OF SUPERVISORS HOLDING OFFICE
AT PASSAGE OF ACT OF 1893.—Under section 204 of the County Govern-
ment Act of 1893 (Stats. 1893, p. 512) the compensation of supervisors in
counties of the eleventh class, who were holding office at the date of its
passage, was not affected thereby, but their compensation is regulated by
the County Government Act of 1891.

APPEAL from a judgment of the Superior Court of Tulare
County. W. W. Cross, Judge.

The facts are stated in the opinion of the court.

Lamberson & Middlecoff, for Appellant.

F. B. Howard, and T. E. Clark, for Respondent.

HARRISON, J.—By the County Government Act of 1891
the compensation of each supervisor in counties of the eleventh
class is fixed at “six dollars per day for actual service, and forty
cents per mile while traveling from his place of residence to the
county seat; provided that no more than one mileage in any one
monthly term shall be allowed.” (Stats. 1891, p. 352.) Each
supervisor was also ex officio road commissioner, and was enti-
tled to receive for his services as road commissioner “twenty
cents per mile one way for all distances actually traveled by him
in the performance of his duties, provided that he shall not in
any one year receive more than three hundred dollars.” (Stats.
1891, p. 476.) By the County Government Act of 1893 the com-
pensation of officers in this class of counties was declared as fol-
lows (Stats. 1893, p. 416):

“15. Supervisors, eighteen hundred dollars per annum for all
services required of them as supervisors and road commissioners.
The provisions of this subdivision shall take effect January 1,
1895.”

Tulare county is a county of the eleventh class, and the de-
fendants Henderson, Twaddle, and Gilliam were elected super-
visors at the general election in 1892 for the term of four

Lamberson & Middlecoff, for Appellant.

F. B. Howard, and T. E. Clark, for Respondents.

HARRISON, J.—The board of supervisors of the county of Tulare, being of the opinion that some of the deputies of certain officers of the county were drawing salaries without authority of law, employed the plaintiffs in 1895 as attorneys to enjoin the auditor of the county from issuing warrants for the salaries, and the treasurer from paying the warrants. Under this employment the plaintiffs began and prosecuted certain actions in the superior court and on appeal to this court, and paid out certain moneys as expenses therein, and afterward duly presented their claims to the board of supervisors for the sums respectively of one hundred and seventy-three dollars and fifty cents and four hundred and sixty-three dollars. These claims were approved by the board of supervisors and ordered to be paid out of the general fund of the county, and were properly certified and delivered by the clerk to the auditor and treasurer of the county. Plaintiffs thereupon made demand of the auditor that he draw his warrants therefor, and upon his refusal instituted the present proceeding for a writ of mandate. The superior court granted their application, and the auditor has appealed.

The court found that all of the facts alleged in the complaint were true, and the appellant does not specify the insufficiency of the evidence to sustain any of the findings, or that the court erred in admitting any evidence, but relies upon certain other errors of law. In his answer the defendant denied the employment of the plaintiffs, or that they had rendered any services to the county, and at the trial the court refused to permit him to show by several of the county officers that the deputies employed by them, and in reference to whose salaries the suits were begun by the plaintiffs, were necessary to the performance of the duties of their respective offices. The court also refused to allow the defendant to show whether the plaintiffs had brought any suits, and whether they had assisted the district attorney in bringing any suits, and whether the district attorney had sought for any assistance and what had been the results of the suits brought by the plaintiffs. These questions were all irrelevant and immaterial to the issue before the court. If the supervisors had the

authority to employ the plaintiffs for the purpose of bringing the suits, the propriety or necessity of their employment could not be reviewed by the auditor, nor could he question the value of the services rendered under the employment after it had been fixed by the board of supervisors in allowing their claim therefor. It was said in *Lassen County v. Shinn*, 88 Cal. 510: "It is settled law that where a county has legal business to be transacted, its board of supervisors may employ counsel other than the district attorney to transact the business, if, in the judgment of the board, the public interest will thereby be subserved. This is rested upon the ground that the district attorney may be incompetent or sick or absent from the county or engaged in other business, so that he cannot attend to it, or the business to be transacted may be outside of the county." And in *McFarland v. McCowen*, 98 Cal. 329, it was held that where a claim for services, which if performed is a legal charge against the county, has been duly presented to the board of supervisors, regularly considered, allowed, and ordered paid, the auditor cannot refuse to draw his warrant therefor upon the ground that such services were never rendered. The allowance and settlement of the claim by the board of supervisors is an adjudication, by a tribunal having jurisdiction of the matter, that the services have been rendered, and of the correctness of their value, and is conclusive. (*Colusa County v. De Jarnett*, 55 Cal. 373; *McConoughey v. Jackson*, 101 Cal. 265; 40 Am. St. Rep. 53.) The board of supervisors is made by law the guardian of the interests of the county, and by subdivision 17 of section 25 of the County Government Act is given authority (Stats. 1893, p. 356) "to direct and control the prosecution and defense of all suits to which the county is a party, and to employ counsel to assist the district attorney in conducting the same." Not only are they empowered to employ counsel to assist the district attorney, but they may also employ counsel for the purpose of directing and controlling the prosecution and defense of any suit to which the county is a party. Whether, in any particular case, such employment shall be made is addressed to the discretion which they are to exercise in behalf of the public interests. If, in their opinion, the interests of the county require such employment, it is their duty to secure the services of a competent attorney therefor. In the present case,

the fact that the district attorney was one of the officers whose deputies were included among those who, in the opinion of the supervisors, were not entitled to be paid by the county, made it eminently proper that other counsel should be employed. Neither is their right to employ counsel, and make the value of their services a charge upon the county, dependent upon the result of the suit. Wherever there is room for an honest difference of opinion as to such result, the supervisors are justified in thus seeking to protect the interests of the county. The character of these suits is not disclosed by the present record, but the suits themselves have been under consideration by this court in connection with this appeal, and it cannot be said with reference to them that the law upon the questions involved was so settled that only a single result could be anticipated.

The judgment is affirmed.

Garoutte, J., and Van Fleet, J., concurred.

Hearing in Bank denied.

[S. F. No. 724. Department Two.—September 25, 1897.]

JOSEPH TAYLOR, Respondent, v. WILLIAM R. HEARST,
Appellant.

LIBEL—ABSENCE OF EXPRESS MALICE—COMPENSATORY DAMAGES—GOOD FAITH AND REASONABLE CARE PERTINENT ONLY TO PUNITIVE DAMAGES.—Where there is an absence of express malice in the publication of a libel, there being neither a willful intent to injure the plaintiff nor gross carelessness in the publication, the recovery is limited to compensatory damages; and the questions of good faith and reasonable care are pertinent only where the question of punitive damages is involved, and not where the inquiry is confined to compensatory damages, which may be recovered without regard to the good faith or caution which attended the publication.

ID.—APPEAL—LAW OF CASE—EXPRESS MALICE ELIMINATED—SECOND TRIAL—IMPERTINENT EVIDENCE.—Where, upon a former appeal, the question of express malice was entirely removed from the case, so that plaintiff's recovery was limited to compensatory damages, evidence offered upon the second trial addressed to the good faith of the publication, and to the negligence of the publisher, is properly ruled out, as not being pertinent to the inquiry.

ID.—INSTRUCTIONS—GOOD FAITH AND REASONABLE CARE—DAMAGES—ERROR WITHOUT INJURY.—Where the court instructed the jury as matter of law that punitive damages could not be awarded for the publication of the libel in question, an instruction as to the nature of good faith, and reasonable care, which could only be pertinent where punitive damages are involved, and had no bearing upon the facts of the case, is error without injury.

ID.—AMOUNT OF COMPENSATORY DAMAGES.—An award of five hundred dollars for compensatory damages for the publication of a libel without express malice cannot be regarded as excessive.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William R. Daingerfield, Judge.

The main facts are stated in *Taylor v. Hearst*, 107 Cal. 262. Further facts are stated in the opinion of the court rendered upon this appeal.

W. W. Foote, for Appellant.

J. C. Bates, for Respondent.

HENSHAW, J.—This is a second appeal. The facts are substantially the same as those considered upon the first appeal. They will be found set forth at length in *Taylor v. Hearst*, 107 Cal. 262.

It will be observed that the question of express malice, which may be evidenced either by a willful intent to injure, or by gross carelessness, was, under the facts and the law as laid down in the former opinion, entirely removed from the case. This was the view taken by the trial court, and the jury was so instructed.

Plaintiff's recovery, therefore, was limited to compensatory damages. Certain questions asked of defendant's witnesses were ruled out under objections. These questions were addressed to the good faith of the publication, and to the negligence of the publisher. But good faith and reasonable care are pertinent inquiries where the question of punitive damages is involved, not where, the matter being libelous *per se* and its publication admitted, the recovery is expressly limited to compensatory damages. For a plaintiff under such facts is entitled to compensatory damages, without regard to the good faith or caution which attended the publication. (*Wilson v. Fitch*, 41 Cal. 363; *Taylor v. Hearst*, 107 Cal. 262; *Turner v. Hearst*, 115 Cal. 394; *Mc-*

Allister v. Detroit Free Press Co., 76 Mich. 338; 15 Am. St. Rep. 318; *Scripps v. Reilly*, 38 Mich. 10; *Warner v. Press Pub. Co.*, 132 N. Y. 181.)

Instruction III, given by the court, is as follows: "Good faith requires of a publisher that he exercise the care and vigilance of a prudent and conscientious man, wielding, as he does, the great power of the public press. There must be an absence, not only of improper motives, but of negligence on the part of the defendant."

This instruction would have had pertinency if addressed to a case in which punitive damages were claimed. Upon the facts of this case it had no bearing, for as has been said, the court instructed the jury as matter of law that punitive damages could not be awarded. No injury, therefore, could have been worked appellant.

The award of five hundred dollars for compensatory damages cannot be regarded as excessive. (*Wilson v. Fitch*, 41 Cal. 363; *Gilman v. McClatchey*, 111 Cal. 606.)

The judgment and order appealed from are affirmed.

McFarland, J., and Temple, J., concurred.

[S. F. No. 579. Department Two.—September 25, 1897.]

SOUTHERN PACIFIC COMPANY, Appellant, v. VON SCHMIDT DREDGE COMPANY et al., Respondents.

CONTRACTS—CHARTER OF BARGES FOR USE OF DREDGE COMPANY—EXECUTION BY PRESIDENT—COPARTNERSHIP—PAROL EVIDENCE.—Where one of the members of a copartnership doing business under a corporate name having his surname in its title, chartered barges expressly for the use of the copartnership, and designated himself in the charter and in the signature thereof as president of such company, the evidences upon the face of the charter that it was designed to be the contract of the copartnership, if not sufficiently clear of themselves to prove it as matter of law, are, at least, sufficient to warrant parol evidence to show that the company was bound by the terms of the contract as principal.

ID.—PRINCIPAL AND AGENT—DESIGNATION OF AGENCY IN WRITTEN CONTRACT—EVIDENCE—DISTINCTION ABOLISHED.—The distinction at common law between sealed and unsealed instruments, as to the effect of words

of agency appended to the name of a contracting party in the body and signature of the contract, is abolished in this state, and the rule as to simple contracts is applicable, that words of agency employed in the written contract are to be regarded, not as descriptive merely, but as importing character and capacity; and, where the reading of the contract, however inartificially it may be drawn, discloses that it is executed for or on behalf of a principal, or even leaves the matter in doubt, parol evidence may be used to determine whose contract it is, and this even in cases where the instrument is sufficiently clear in its terms to bind the agent personally.

ID.—NEGLIGENCE OF BAILEE—INJURY FROM STORMS TO CHARTERED BARGES—PREVENTION OF INJURY—QUESTION OF FACT—NONSUIT.—In an action for injury to chartered barges, where one count of the complaint was upon the terms of the charter covenanting to return the barges in good condition, etc., and a second count charged defendant with failing to exercise the ordinary care required of a bailee for hire, and the plaintiffs' evidence showed that the barges were placed by the defendant in shallow water, off a lee shore, and left exposed to the fury of a southeastern storm of unprecedented severity, that the barges were not designed to meet or withstand heavy weather, that defendant knew this when receiving them, and that injury to the barges might have been prevented by removing them to a sheltered shore, it is a question of fact for the jury whether the defendant did or did not exercise due care for the preservation of the barges, and it is error to grant a nonsuit for want of proof of negligence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

J. E. Foulds, and Fred B. Lake, for Appellant.

A. Van Duzer, for Respondents.

HENSHAW, J.—Plaintiff sued to recover damages for injuries sustained by two of its barges while under charter to defendant company. Plaintiff is a corporation, defendant a copartnership.

The complaint contained two counts, the first tendered issue upon the violation of a covenant in a written contract, while the second charged defendant with failing to exercise the ordinary care required of a bailee for hire. (Civ. Code, secs. 1928-30.)

It is undisputed that defendant took the barges upon December 20th, and returned them upon January 2d following. Under the first count defendant denies that it covenanted to return the

barges in good order, ordinary wear and tear only excepted. Under the second count it denies a failure to exercise ordinary care for the preservation of the leased property. It affirmatively alleges that injury to the barges was occasioned by an unusual and unprecedented storm, and resulted from the act of God or inevitable casualty.

At the conclusion of plaintiff's evidence a nonsuit was granted, and from the judgment entered plaintiff appeals.

Plaintiff, in support of its first count, offered in evidence the following contract, which was denied admission as not being the contract of the defendant dredge company:

"San Francisco, December 20, 1892.

"This agreement, made this day and date above mentioned, is such that Mr. A. W. Von Schmidt, president of the Von Schmidt Dredging Co. of this city, charters from the S. P. Co. their barges named *Nicolaus* and *Yuba City*, to be used at Baden, Cala., as pontoons to hold up the discharge pipes of the dredging company, and not for rough service, for a period of thirty days or longer, for the sum of ten dollars per day each barge. Barges to be accepted at and returned to foot of Market street, La Rue's wharf, San Francisco (unless otherwise agreed), in as good order as received, usual wear and tear only excepted.

"(Signed)

J. D. CASE,

Agent S. P. Co.

"A. W. VON SCHMIDT,

"President Von Schmidt Dredge Co.

"H. T. Graves, Witness."

The appellant insists that this ruling was error; that upon the face of the agreement there was sufficient to show that it was the contract of the partnership, or at least sufficient to leave the question one of doubt, to be solved by parol proof. Respondent answers that the contract appears on its face to be the contract of A. W. Von Schmidt individually; that the appended words, "President of the Von Schmidt Dredge Co.," found in the body of the instrument and after his signature, are words of description merely, and that they no more make it the contract of the company than would a promissory note "signed C. F. Crocker, president of the S. P. R. R. Co., make it the note of the company." But respondent is unfortunate in his illustration, for

while this may not be sufficient to establish it as the note of the company, it would, under well-settled rules and abundant authorities, as we shall hereafter see, leave the question open to parol proof. Equally unfortunate is he in the cases which he cites to support his contention. They are those of *Echols v. Cheney*, 28 Cal. 157, *Morrison v. Bowman*, 29 Cal. 337, and *Haskell v. Cornish*, 13 Cal. 45. For in the last case a promissory note reciting that "we, the undersigned trustees of the First A. M. E. church, in behalf of the whole board of trustees of said association, promise to pay," etc., and signed by two of the trustees individually, was held to be the note of the corporation, and not of the individuals. And in the other cases this court was dealing with contracts under seal before the distinction had been abolished, and at a time when, therefore, all the extremely technical common-law rules governing the interpretation of specialties were in full force. But these rules were never applied to simple contracts, even at common law, and with the abolition in this state of the distinction between sealed and unsealed instruments they likewise ceased to exist.

Thus the rule is well settled that where a reading of a simple contract, however inartificially it may be drawn, discloses that it is executed for or on behalf of a principal, or discloses an intent to bind such principal, or even leaves the matter one of doubt, parol evidence may be employed to determine whose contract it is, and this even in cases where the instrument is sufficiently clear in its terms to bind the agent. This is not contradicting by parol the terms of a written instrument, for, as has been said, "It is no contradiction of a contract, which is silent as to the fact, to prove that a party is acting therein not on his own behalf, but for another. 'This does not deny,' said Parke, B., 'that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal.'" (Bishop on Contracts, sec. 1084.)

In consonance with this view it was at a very early day, and before the sealed contract was abolished in this state, that this court elaborately considered the meaning of the word "agent" appended to a signature upon a bill of exchange, and held that

in the case of a simple contract the word was not descriptive, but imported character and capacity. It further held that, if the capacity is thus shown upon the face of the instrument, resort may be had to parol evidence to elucidate further doubts or difficulties, in order to arrive at the true intent of the parties, and it is said: "It would seem clear from these cases that where the agent discloses the name of the principal, or that fact is otherwise known to the party receiving the bill at the time the same is made, then the agent is not responsible, though the name of the principal be not stated on the face of the paper, and only the name of the agent be signed, with the term 'agent' appended to it." (*Sayre v. Nichols*, 7 Cal. 535; 68 Am. Dec. 280.)

Later, in *Bean v. Pioneer Min. Co.*, 66 Cal. 451, 56 Am. Rep. 106, the principle was again reannounced with more fullness in an approved quotation from Abbott's Trial Evidence, and it is said: "If upon the face of the instrument there are indications suggestive of agency, such as the addition of words of office or agency to the signature, or the imprint of the corporate title on the paper—parol evidence is competent to show whom the parties intended should be bound or benefited. And even where the contract *bears no such suggestion* on its face, the rule as now generally received is, that parol evidence is competent, either in favor of or against the corporation (except, perhaps, when the instrument is a specialty); but that it is not competent for the purpose of exonerating the signer from personal liability, if the other party to the instrument chooses to hold him personally liable, unless there was evidence that the signer was duly authorized to contract for the corporation, and that credit was actually given to the corporation alone."

In *Burgess v. Fairbanks*, 83 Cal. 215, 17 Am. St. Rep. 230, the only evidence of agency apparent upon the face of the instrument was the signature, "William T. White, Agent for George E. White." This court said, following the principle as enunciated in the earlier cases: "It at least bears a strong suggestion of agency, and it would have been competent to show by parol evidence how it was received, and who was intended to be bound by it."

That the rule in California is not peculiar in this regard a consideration of a few of the many authorities bearing on the

matter will at once disclose. In *Higgins v. Senior*, 8 Mees. & W. 833, the contract was made by the agent individually. Being sued upon it, he was not allowed to discharge himself under the plea of nonassumpsit by proving that the agreement was really made by him as agent for a third person, and that plaintiff knew those facts at the time when the agreement was made; but in that connection, and discussing the liability of the principal in such a case had he been sued, it is said: "There is no doubt that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals."

In *Mechanics' Bank etc. v. Bank of Columbia*, 5 Wheat. 326, the contract under consideration was in form of a check. It read: "Mechanics' Bank of Alexandria, June 25, 1817. Cashier of the Bank of Columbia; pay to the order of P. H. Minor \$10,000. William Paton, Jr." It was contended that this was a private check not enforceable against the Mechanics' Bank, and it was urgently insisted that, as under the act incorporating the bank every such instrument was required to be signed by the president and countersigned by the cashier, with the further proviso that the funds of the corporation should not be liable for any contract unless so executed, the bank could not be held under this instrument. But the supreme court of the United States held that the mere appearance of the corporate name on the face of the paper led to the belief that it was a corporate and not an individual transaction, and that when it was shown by parol evidence that the drawer of the check was in fact the cashier, the belief became the stronger, but that in any event "it is enough for the purposes of the defendant to establish that there existed on the face of the paper circumstances from which it might reasonably infer that it was either one or the other. In that case it became indispensable to resort to extrinsic evidence to remove the doubt."

In *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, the written memorandum of contract bore upon its face no evidence that the signer acted as agent. The supreme court of the United States, considering the question, again said: "Extraneous evidence is

also admissible to show that a person whose name is affixed to the contract acted only as agent, thereby enabling the principal either to sue or to be sued in his own name, and this though it purported on its face to have been made by the agent himself, and the principal not named. (*Higgins v. Senior*, *supra*; *Trueman v. Loder*, 11 Ad. & E. 589.) Lord Denman observed in the latter case, 'that parol evidence is always necessary to show that the party sued is the party making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand (or that of an agent), are inquiries not different in their nature from the question, Who is the person who has just ordered goods in a shop? If he is sued for the price and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own.' "

In *Nicoll v. Burke*, 78 N. Y. 580, the court of appeals thus declared the rule: "The principle is well settled that, if the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself as the agent or not, or whether the principal be known or unknown, his principal may be made liable, and will be entitled to sue thereon in all cases, and the instrument may be resorted to for the purpose of ascertaining the terms of the agreement."

In *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314, the contract was entered into between the plaintiff and J. B. Simpson, and was signed "J. B. Simpson, agent." The supreme court held that the fact that plaintiff, when he entered into the contract in writing not under seal, and purporting on its face to be made by the defendant and signed "Simpson, agent," knew that Simpson was acting as agent for another, will not prevent him from holding the principal on the contract, and it is said: "The most that could be fairly argued, in any case, would be that under some circumstances proof that the other party knew of the agency, and yet accepted a writing which did not refer to it, and which in its natural sense bound the agent alone, might tend to show that the contract was not made with anyone but the party whose name was signed; that the agent did not sign as agent and was not understood to do so, but was himself the principal. But these are questions of fact, and as matter of law it

is obvious, and it is found, that the defendant was the principal, and that the contract was made with her. The objection that two persons cannot be bound by the same signature to a contract, if sound, would be equally fatal when the principal was not known. There is a double obligation, although there can be but one satisfaction. Our decision is in accordance with a thoroughly discussed English case which went to the exchequer chamber, and with the statement of the law by Mr. Justice Story there cited."

In *Deering v. Thom*, 29 Minn. 120, where the contract was made by one individually, and to his signature he appended the word "agent," it was held that he could relieve himself by proof that he acted for and intended to bind another for whom he was agent, and that when the contract was executed it was so understood and intended between him and the other party.

But in *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71, it was held, in accordance with the rule as expressed in the Massachusetts case, that the agent under such a contract could not relieve himself, but that the other party to the contract had his election to proceed if he chose against the principal, whether disclosed or undisclosed.

In *Traynham v. Jackson*, 15 Tex. 170, 65 Am. Dec. 152, the note in suit read: "Twelve months after date, we, the trustees of Chapel Hill College, promise to pay T. J. Jackson or order \$300," and was signed by the individual names of eight men, without description or designation. The court held that while *prima facie* the defendants were personally liable, yet that they should be permitted to prove by parol evidence that they were agents of the corporation, and were acting as such within the limit of their authority, and that this was known to the plaintiff at the time of the contract, and that such proof would relieve them from responsibility on the contract, leaving to the holder of the note the right of recourse against the corporation.

In *Smith v. Alexander*, 31 Mo. 193, it was held where a written contract not under seal was executed in the name of an individual, and signed "J. H. Alexander, Treasurer Ohio & Mississippi R. R. Co.," that it was not indispensable, in order to bind the principal, that it should be executed in the name and as the act of the principal, but that it would be sufficient if,

upon the whole instrument, it could be gathered from the terms that the party describes himself and acts as agent and intends thereby to bind the principal; and, further, that the addition to the name signed to a contract, of the official character of the person so signed, is a suggestion and indication of representative character, and will justify resort to parol evidence to prove extrinsic circumstances by which the true liability of the principal and agent may be determined.

In *Use v. Shearer*, 2 Ala. 718, it is held to like effect that when it is doubtful from the face of a contract whether it was intended to operate as the personal engagement of the party signing it, or to impose an obligation upon some third person as his principal, parol evidence is admissible to show the true character of the transaction.

In *Haile v. Peirce*, 32 Md. 327, 3 Am. Rep. 139, it is declared that where the note was signed "C. T. H., President," and "J. N. H., Director," and "E. R. S., Secretary," that *prima facie* it was the promissory note of the individuals, but that the presumption of their individual liability may be rebutted, and that the note upon its face being ambiguous and uncertain, it is competent for either party to show by relevant extraneous proof who were the principals to be charged.

In *Kean v. Davis*, 21 N. J. L. 683, 47 Am. Dec. 182, it was held that a note signed "J. K., President of the E. & S. Co.," leaves it ambiguous on the face whether it was the note of J. K. individually, or of the company, and that in such cases parol proof can be resorted to to show what was the real intention of the parties.

In *Lacy v. Dubuque Lumber Co.*, 43 Iowa, 510, a note was in suit which ran, "Three months after date I promise to pay," and which was signed "M. H. Moore, P. D. L. Co." It was held that when such or similar initials or words are understood or are explained by parol evidence to indicate that the signer of the note is the president of defendant company, it will be concluded that the instrument then sufficiently shows on its face that it is the obligation of the company, and not of the individual.

In *Hardy v. Pilcher*, 57 Miss. 18, 34 Am. Rep. 432, where the bill was executed by the signature of B., followed by the words, "Agent of H.," the court declared that, while ordinarily no ex-

trinsic testimony of any kind is admissible to vary or explain such instruments, that an exception to the rule is "where anything on the face of the paper suggests a doubt as to the party bound, or the character in which any of the signers has acted in affixing his name, in which case testimony may be admitted between the original parties to show the true intent."

In *Richmond etc. R. R. Co. v. Snead*, 19 Gratt. 354, 100 Am. Dec. 670, one who was shown by parol evidence to be the president of the railroad company signed his name, without any addition thereto, to a due bill, acknowledging that there was due to defendants four hundred and eighty-four dollars in full for labor performed on the cottage lot of the railroad company. It was held to be uncertain on the face of the paper whether the contract showed that the labor was performed for the individual or for the company, and parol evidence was admissible to ascertain the fact and bind one or the other accordingly.

We think it unnecessary to pursue these citations further, though they might be indefinitely extended. It remains merely to apply this well-settled rule to the contract in question, and, so applying it, we entertain no doubt that it was competent for the plaintiff to show, if he could, the facts necessary to establish the obligation of the defendant company. The evidences upon the face of the contract that it was designed to be the contract of the company, if not sufficiently clear of themselves to justify a declaration that it is in law the contract of the company, at least are enough to leave the matter in doubt and warrant a resort to parol evidence for explanation. Thus the contract is not with A. W. Von Schmidt, but with A. W. Von Schmidt as president of the Von Schmidt Dredge Company. The barges are chartered to be used by and for the benefit of the dredge company, and Von Schmidt in signing signs as president of the dredge company. These *indicia*, it will be noted, are much plainer and stronger than were shown in many of the contracts where resort to parol evidence was permitted.

It follows, therefore, that the court erred in refusing admission to the contract in evidence and in excluding the offered evidence of plaintiff in respect thereto.

It is not necessary at this time to enter upon a consideration of the effect of this contract upon the liability of the defendant.

It is first subject to interpretation in this regard by the trial court, and only after such interpretation does it become properly a matter for review before us.

In granting the motion for a nonsuit upon the second count of the complaint, the court was of opinion that the evidence presented did not show negligence upon the part of the defendant while the barges were under its charge. In this also we think the court erred, and that the question of negligence under the proofs offered was properly a question for the jury. The barges were placed by defendant in shallow water, off a lee shore, and were left exposed to the fury of a southeastern storm of unprecedented length and severity. So much is admitted. Plaintiffs further proved that the barges were not designed to meet or withstand heavy weather, and that this was known to defendant when it took them. It offered evidence tending to prove that the injury to the barges (over which there is in the record no controversy) was occasioned not by their exposure for a brief time to the sudden fury of the gale, but resulted from their having been left day after day in their exposed position to thresh and pound and work in the heavy sea and wind. It was this long-continued "working" which wrecked them. Plaintiff further offered the evidence of experts—pilots and sea captains—to show that in the exercise of ordinary care and prudence, defendant should not so have allowed the barges to remain, but should have removed them to a sheltered shore near by and readily accessible.

Under such evidence it was clearly a question for the jury to say whether or not the defendant exercised due care for the preservation of the leased property.

The judgment is therefore reversed and the cause remanded.

McFarland, J., and Temple, J., concurred.

[L. A. No. 345. Department Two.—September 25, 1897.]

In the Matter of the Estate of ELLEN M. MARSHALL, Deceased.

ESTATES OF DECEASED PERSONS—APPEAL—ORDER SETTLING FINAL ACCOUNTS AND DISTRIBUTING ESTATE—UNDERTAKING—STIPULATION—DISMISSAL.—An appeal from an order settling the final account of an executor, and distributing the estate, cannot be dismissed on the ground that there are two appeals, and that the undertaking is not sufficient for both appeals, where there is a stipulation in the transcript that "an undertaking in due form was properly made and filed," etc., and counsel cannot be relieved from such stipulation after the expiration of the time within which another bond might have been filed, upon a showing that the undertaking in fact referred to only one of the appeals, without determining which.

ID.—SETTLEMENT OF FINAL ACCOUNT—ITEMS ALLOWED IN PREVIOUS SETTLEMENTS.—Items in a final account which had been allowed in previous accounts, which were settled after due and sufficient notice of the filing thereof, and of the time and place of hearing, are conclusive, and cannot be re-examined upon settlement of the final account.

ID.—COMMISSIONS OF EXECUTORS—ALLEGED AGREEMENT FOR LESS COMPENSATION—FINDING OF COURT.—An allowance of full commissions to the executors in the final account will not be disturbed upon appeal, because of an alleged agreement for less compensation, where there is not sufficient evidence in the record to overthrow the finding of the court against the fact of such agreement.

ID.—RENTS OF PROPERTY DEVISED JOINTLY—DISTRIBUTION.—Where a dwelling-house and lot were devised jointly to the husband of the decedent, and to their three daughters, subject to the right of the husband to occupy the furnished house for life, and to the right of any widowed or homeless daughter to occupy the same jointly with the husband, one-third of the value of the furniture being the property of the husband, and the remaining two-thirds thereof having been bequeathed by the decedent to the three daughters, in making distribution of rents of the furnished house received by the husband, who was one of the executors, the rental value of the house and lot is to be ascertained separately, and the proportion of rent received therefrom is properly distributed to the husband and three daughters, share and share alike, and the rental value of the furniture, after deducting the husband's third thereof, is properly distributed to the three daughters, share and share alike.

ID.—ALLOWANCE TO ATTORNEY FOR EXECUTORS.—The allowance of one hundred dollars as a fee for the attorneys of the executors for legal services rendered about the matters of the estate, after the allowance and approval of the second annual account of an estate of the total value of over forty-eight thousand dollars, is not unreasonable.

ID.—CERTIFICATE OF INDEBTEDNESS OF INSOLVENT BANK—CHARGE OF AMOUNT RECEIVED—STATEMENT BY EXECUTORS.—Where the proportionate share which the estate received upon a certificate of indebtedness of an in-

solvent bank was less than its face amount, the executors should not be charged with the full amount of the face of the certificate, but only with the real amount received, although the executors first stated the amount of the certificate as cash.

APPEAL from a decree and order of the Superior Court of San Diego County settling the final account of executors, and distributing the estate of a deceased person. W. H. Clark, Judge.

The facts concerning the rents of property devised jointly to the appellants and the executor, Marshall, and concerning the allowance of a fee for services of the attorneys of the executors, are stated in the syllabi upon those points. Further facts are stated in the opinion of the court.

J. L. Tucker, for Appellants.

McDonald & McDonald, for Respondents.

McFARLAND, J.—When this cause was submitted there was also submitted a motion to dismiss the appeal upon the ground that there was no sufficient undertaking on appeal given. The order appealed from is an order settling the final account of the executors of the estate of Ellen M. Marshall, deceased, and also distributing certain remaining property of said estate, and it is contended by respondent that there are really two appeals, one from the order settling the account and the other from the order of distribution, and that as the undertaking refers to only one appeal it is invalid, because it cannot be determined to which of the appeals it refers. The appeal is really only from certain named parts of the order, and it is doubtful whether it is an appeal from anything more than parts of the order settling the account. But this question need not be determined, because counsel for respondents signed a stipulation which was attached to the transcript to the effect “that an undertaking in due form was properly made and filed on behalf of said legatees and devisees in said action within five days after the service and filing of the said notice of appeal”; and after the expiration of the time within which another bond might have been filed counsel cannot be relieved of the effect of such a stipulation upon the show-

ing made in this case. The motion to dismiss the appeal is denied.

Upon the merits of the case we see no good reason for disturbing the order of the court below. The largest and main item of the account which is contested by appellants was a certain amount expended by the executors in the construction of a tomb over the remains of the decedent; but that amount was allowed and approved in the settlement of the first and second final accounts of the executors as found by the court, "after due and sufficient notice of the filing of said accounts and of the time and place of hearing thereon had been given, and that neither of said orders have ever been appealed from or set aside or modified." This, under the circumstances of this case, was conclusive. (Code Civ. Proc., secs. 1633, 1634, 1637; *Estate of Stott*, 52 Cal. 403; *Walls v. Walker*, 37 Cal. 424; *Reynolds v. Brumagim*, 54 Cal. 254.) This is also true of the item arising out of the sale of a carriage. It is also contended by appellants that the court erred in allowing the executors their commissions, which they were entitled to under the code, upon the ground that they had agreed to take less; but we see no sufficient evidence in the record to warrant us in overruling the court below upon that point. Neither do we see any error committed by the court in the matter of rents which belonged jointly to the appellants and the executor, Marshall; the conclusion of the court upon that point seems to be correct. The allowance of one hundred dollars as a fee for the attorneys of the executors was not unreasonable, and was properly allowed. Something is said in the brief of appellants about a certain certificate of indebtedness which the estate had against a bank which became insolvent. It appears that the executors first stated the amount of the face of the certificate as cash, but it appears that the proportionate share which the estate received upon the said certificate of the insolvent bank was less than its amount, and appellants seem to claim that the executors should be charged with the full amount of the face of the certificate. But, while this point is alluded to in the brief, no such point is made in the exceptions to the final account of the executors or in the specifications of error. Indeed, other parts of the transcript show that all parties under-

stood the real amount to be that which was approved in the account. We see no other points necessary to be noticed.

The order appealed from is affirmed.

Henshaw, J., and Temple, J., concurred.

[S. F. No. 731. Department Two.—September 25, 1897.]

JOHN A. TOWNLEY, Appellant, v. EDSON F. ADAMS, Respondent.

NEW TRIAL—CONSTRUCTION OF CODE—LIMITATION OF POWER OF COURT TO SET ASIDE VERDICT OF ITS OWN MOTION—REVIEW UPON APPEAL.—The superior court has no power to set aside a verdict and to order a new trial of its own motion, without an application of either party, other than that expressly conferred by section 602 of the Code of Civil Procedure, in cases where there has been such a plain disregard by the jury of the evidence as to satisfy the court that the verdict was rendered under a misapprehension, or under the influence of passion or prejudice, or where there has been such a plain disregard of the instructions as to satisfy the court that the verdict was so rendered; and though such an order will be sustained, if the case is clearly within that section, notwithstanding an unauthorized reason is assigned therefor, yet, where the record discloses a case not specified in that section, an order of the court setting aside the verdict of its own motion must be reversed upon appeal.

APPEAL from an order of the Superior Court of Alameda County setting aside a verdict of its own motion. A. L. Frick, Judge.

The facts are stated in the opinion of the court.

Dunne & McPike, for Appellant.

William & George Leviston, and H. S. Brown, for Respondent.

HENSHAW, J.—The firm of Darby, Laydon & Co. entered into a written contract with the defendant Adams for the construction of a bulkhead upon his property in Oakland harbor. This action (brought by the firm's assignee) was to recover the sum of \$2,534.73, alleged to be due for extra labor and mate-

rials furnished in connection with the work. The controversy was given to a jury for determination, and the jury returned its verdict for plaintiff in the amount sued for. Thereupon the court, without motion or application of either party, but upon its own motion, set aside the verdict in the following order: "The court of its own motion orders that the said verdict as rendered be, and the same is hereby, set aside and a new trial ordered, upon the ground, and no other, that the evidence as given does not justify the verdict as rendered, and that said verdict is against the law and the evidence." From this order plaintiff appeals. His contention is, that under the facts presented by the record the order was in excess of the jurisdiction of the court.

Section 657 of the Code of Civil Procedure provides that "the former verdict or other decision may be vacated and a new trial granted, *on the application of the party aggrieved*, for any of the following causes materially affecting the substantial rights of such party. . . . 6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law."

Section 662 declares that "the verdict of a jury may also be vacated and a new trial granted by the court in which the action is pending, *on its own motion*, without the application of either of the parties, when there has been such a plain disregard by the jury of the instructions of the court or the evidence in the case as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice."

If the section last quoted is to be construed as a limitation upon the power of the court to grant a new trial, then, before the exercise of that power can be upheld, it must be made to appear either: 1. That there has been such a plain disregard by the jury of the evidence as to satisfy the court that the verdict was rendered under a misapprehension or under the influence of passion or prejudice; or 2. That there has been such a plain disregard of the instructions as to satisfy the court that the verdict was so rendered. That the provisions of the code do define the powers of the court in granting a new trial, and limit the exercise of those powers, we entertain no doubt. Section 4 of the Code of Civil Procedure provides as follows: "The rule of the common law that statutes in derogation thereof are to be

strictly construed has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice." In *Dorsey v. Barry*, 24 Cal. 449, discussing the power of the inferior court to grant a new trial, it is said: "It does not necessarily follow that if the appellate court can order a new trial in the inferior court that the inferior court can of its own motion grant a new trial. It will be remembered that in the early history of the common-law courts of England the court of chancery directed a new trial at law in those courts, and it enforced its decree under the penalty of a perpetual injunction if the adverse party should refuse. (1 Graham and Waterman on New Trials, 4.) The power to grant new trials and the mode of its exercise are dependent mainly, if not entirely, upon the statute in both civil and criminal actions. The grounds upon which it may be obtained and the manner of applying for and procuring it are therein prescribed."

In *Humiston v. Smith*, 21 Cal. 129, it was laid down that the system of remedies provided by the practice act is exclusive, and when it provides an adequate remedy no other can be pursued.

In *Kelly v. Larkin*, 47 Cal. 58, it is held that the motion for a new trial under the practice act is a remedy and not a right. The rules and principles here announced are not changed by transforming the earlier practice act into the present Code of Civil Procedure. A like interpretation has been given by the supreme court of Missouri to its code sections. In *State v. Adams*, 84 Mo. 310, it is said: "For the causes named in section 3705 the court of its own motion may set aside the verdict. Its common-law power in that respect is not prejudiced by the statute. On other grounds than those specified in that section the court cannot of its own motion set aside the verdict." And for extended consideration of the subject, see Hayne on New Trial and Appeal, sections 7-10. In concluding his discussion upon the subject the learned author says: "It is submitted that the statute gives the power in those cases only in which the error of the jury is so gross as to be at once apparent."

The reason given by the court for granting the new trial, it may be noticed, is not amongst those for which such an order

may be made of the court's own motion; but it is amongst those for which the court may grant a new trial upon application of the aggrieved party, and after the exercise of the very valuable right secured in such cases to the party resisting the motion to convince the court, if possible, by argument that the reason is not well founded. Where, however, the court grants the new trial of its own motion, the party against whose interests the order is made is deprived of this substantial right, and therefore it is that the lawmakers have restricted the court to cases of plain and gross abuse by the jury.

But, while the reasons thus given by the court are not such as will sustain the order, it will not be reversed if, upon careful inspection of the record, it may be seen that the order may be supported upon valid grounds. It thus becomes necessary to consider: 1. Whether there was a plain and palpable disregard by the jury of the evidence; and 2. Whether there was a plain and palpable disregard by the jury of the instructions.

In general, the work which the contractors were to perform was to drive the piles and construct the woodwork of the bulkhead. The piles were to be furnished by the defendant. The work was to be done under the supervision of his engineer. The work was to be completed upon a given date, and for each day's delay in completion thereafter the contractors were to forfeit \$25 liquidated damages. The owner was privileged to modify, change, add to, or subtract from the work to be done, and extra work was to be performed only under written order of the engineer. Materials which the contractors furnished were to be paid for at stipulated rates. Of the items which go to make up the amount sued for, some were undisputed. It was admitted by defendant that but \$4,700 had been paid upon the contract price of \$4,936.49. Of the disputed items for extra labor and material, one was the supply by the contractors of some 1,300 pounds of iron at seven cents a pound; another was \$400 for extra work of excavating; and the third was the sum of \$1,194 for driving 398 sheet piles at three dollars each. Upon each of these items plaintiff offered evidence in support of his demand. Upon the first item of iron there is no apparent conflict in the evidence. Upon the last item of extra work in excavation plaintiff offered evidence to prove the number of laborers employed and the

amount of time by them consumed in the performance of the work, from which it would appear that the actual cost to the contractors was \$367.69, leaving to them a profit upon this item of \$32.31. A substantial difference between the parties upon this item was whether or not this work, or all of it, was extra work. Upon this there was a conflict in the evidence. Upon the larger item of \$1,194 for driving 398 sheet piles, charged for at the rate of three dollars a pile, the facts are as follows: The contract provided that these piles "shall be driven hard to a depth satisfactory to the engineer in charge." The contract further provided that the owner and engineer should be represented at the work by an inspector. The evidence upon the part of the plaintiff is, that each one of these piles was selected by the inspector, all being furnished by the defendant under the contract; that each one of them was driven under the immediate supervision and direction of the inspector, and that the driving of each one of them was stopped only when the inspector declared that it had been driven far enough. After the piles had thus been driven, and the work approved and payments thereon made during its progress, as provided for by the contract, the engineer in charge reached the conclusion that the piles had not been driven far enough, and orders were given for the redriving of them. This necessitated much additional labor and expense upon the part of the contractors, and greatly delayed the completion of the work. It became necessary to drive the piles with an overhanging machine, and by the use of a "follower," whereby the driving force was but indirectly applied to the head of the pile. The testimony of plaintiff's witnesses is to the effect that the necessary outlay in thus redriving these piles six feet further was three dollars a pile. The conflicting evidence is that of the engineer, to the effect that the value of thus redriving or "following" the piles was by no means so much as was contended for.

Upon the part of the defendant, and as a defense, it was urged that the work was not done in a workmanlike manner, and to support this it was shown that after the completion of the work a section of the bulkhead had sprung and "gone out." In contradiction of this, however, plaintiff offered evidence to prove that the work was done under the immediate direction, supervision, and orders of the engineer, and of the inspector repre-

senting him, who was constantly and continuously there; that the materials used were furnished, as the contract provided, by defendant; that the piles were driven to the depth required; that no objection at any time was made by the engineer in charge, or by the inspector, to the character of the work done; that the contractors received the final certificate from the engineer to the effect that the work had been fully completed in a good and workmanlike manner, and that the break in the bulkhead was occasioned by an inherent defect in the work itself, in that the structure was not sufficiently strong to resist the pressure of the filling placed behind it after dredging the earth away from the front of the piles to a depth of twenty-two feet.

Upon the proposition, admittedly true, that the extra work was not ordered in writing by the engineer, evidence was offered to show that compliance with this provision was waived by executed parol agreement of the parties. Upon the question of the delay in the completion of the work beyond the contract time, and the counterclaim of liquidated damages therefor at the rate of \$25 per day, while it was admitted that the work was not completed in time, evidence upon the part of the plaintiff was offered to show that the delay was occasioned by the extra work which they were ordered to perform, made necessary by inherent weaknesses and defects in the original plans.

And, finally, it may be observed that at the completion of plaintiff's case the court denied defendant's motion for a nonsuit, thus evincing its belief that the plaintiff had offered substantial evidence in support of his pleading.

So it appears upon the first proposition that there was evidence adduced upon behalf of the plaintiff upon all of the issues in the case, both those presented by the complaint, as well as those tendered by the answer.

Upon the second proposition, that of the palpable or gross disregard by the jury of the instructions of the court, it is to be noted that every one of the issues of fact which we have been reviewing was submitted by the court to the determination of the jury under instructions pertinent for their consideration. Upon no proposition was the case withdrawn from the jury, nor upon any matter did the court direct a verdict. It was, therefore, by the court left open to the jury to reach a conclusion

upon all of these disputed facts, and, doing so, they found in favor of the plaintiff. We are unable to perceive here any such plain abuse of the instructions as is contemplated by section 662.

Properly to emphasize the distinction which exists between the right of a court to grant a new trial upon application of a party, and the right to grant it upon its own motion, it should be said that the foregoing considerations have nothing to do with what may be conceived to be the weight of evidence. Thus, it might well have been that had the court, upon application of defendant and after exercise by plaintiff of his right of argument, granted the new trial, this court, under its well-settled rules, would not have considered the question of preponderating evidence, and would not have disturbed the order of the trial court made after such hearing; but where, as here, the court of its own motion sets aside the verdict of the jury, then, as has been said, it must be made to appear that the jury plainly, palpably, grossly, disregarded either the evidence or the instructions of the court. In this case it is quite apparent that such gross disregard has not been shown to exist.

The order is therefore reversed and the cause remanded.

McFarland, J., and Temple, J., concurred.

Hearing in Bank denied.

[Crim. No. 262. Department Two.—September 25, 1897.]

THE PEOPLE, Respondent, v. CHARLES MCNEILL, Appellant.

CRIMINAL LAW—ASSAULT WITH INTENT TO KILL—PRIOR CONVICTION—DENIAL AND SUBSEQUENT CONFESSION—VERDICT—SENTENCE—RECITAL IN JUDGMENT—APPEAL.—Where a defendant charged with an assault with intent to kill, and also with having suffered a prior conviction of another felony, when arraigned, pleaded not guilty of the offense charged, and denied the prior conviction, and the verdict passed only on the plea of not guilty, but the sentence was too great, unless based on the prior conviction, and the judgment recited that defendant subsequently, on a specified day, confessed the prior conviction, the truth of which recital was not controverted, the verity of the recital must be accepted; and where it appears that the case was conducted on the theory that the prior conviction had been confessed, and no reference

was made to the prior conviction, either in the reading of the information or in the charge of the court, there is no defect in the judgment-roll of which defendant can take advantage upon appeal, and no error appears upon its face.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William T. Wallace, Judge.

The facts are stated in the opinion of the court.

William Hoff Cook, for Appellant.

W. F. Fitzgerald, Attorney General, and Henry E. Carter, Deputy Attorney General, for Respondent.

McFARLAND, J.—This is an appeal by defendant upon the judgment-roll alone. He was charged in the indictment with the crime of an assault with intent to kill. He was also charged with having suffered a prior conviction of another felony. Where defendant is charged with a prior conviction, embarrassment in the proceeding usually follows, where, as is usually the case, little care is exercised by the prosecuting officers to closely follow the statute.

When defendant was arraigned, the plea which he there entered, as appears by the record, was in the following form: "Not guilty to the information, and denies prior conviction." The verdict was as follows: "We, the jury, find the defendant guilty of an assault with a deadly weapon, and so say we all." The judgment was that the appellant be punished by imprisonment in the state prison for the term of five years. As the maximum punishment for the crime of an assault with a deadly weapon is two years' imprisonment (Pen. Code, sec. 245), of course, the judgment was excessive, unless the court in pronouncing the judgment had the right to consider the previous conviction under section 666 of the Penal Code. Appellant contends that this judgment was erroneous because the jury did not find the appellant guilty of previous conviction, as provided by section 1158 of the Penal Code; but the judgment recites that the defendant was informed of the information against him, and of his plea as hereinbefore stated, and also that the defendant "subsequently, on the eighteenth day of September, 1896, confesses the prior conviction"; and there is nothing in the record which contradicts

or is not consistent with this statement in the judgment, and section 1200 of the Penal Code provides that, when the defendant appears for judgment, he must be informed of the nature of the charge, of his plea, of the verdict, etc. The provisions of the Penal Code with respect to the procedure, where a defendant is also charged with a previous conviction, are very loose, and were evidently drafted by one unfamiliar with criminal practice, and with the technical language usually employed to designate pleadings, etc., in such procedure. Section 1158 provides that when a previous conviction is charged in an indictment or information the jury must find a special verdict as to such charge, "unless the answer of the defendant admits the charge." This, of course, leaves the matter very indefinite, as there is no such word as "answer" used in any other part of the criminal procedure to designate either a plea or any other matter. Section 1093 provides that, where a previous conviction is charged, and the defendant "has confessed" the same, the clerk, in reading the information, must omit therefrom all that relates to such previous conviction. But there is no provision as to how the confession shall be made to appear, or in what way the "answer" mentioned in section 1158 shall be shown. No doubt it would be better for the record to show that the defendant formally made a confession in the form of a plea entered upon the minutes contemporaneously with the making of the confession; but it cannot be said that the code requires such procedure, and as the judgment states the fact that he did confess on a certain day, and as that fact is in no way contradicted by the record, and as there is no attempt to show that the statement is not true, its verity must be accepted. Indeed, the proceedings in the case, so far as they appear, show that the case was conducted upon the theory that there had been a confession of a prior conviction; for it appears that at the commencement of the trial only that part of the information which charged the defendant with assault with intent to commit murder was read to the jury, and in the charge of the court, which appears in the record, and which is quite lengthy, there is no reference whatever to the charge of a prior conviction, all of which was evidently in accordance with the right of the appellant under section 1093, to keep from the jury all knowledge of the charge of the prior conviction.

tion. There is, therefore, no defect in the judgment-roll of which the appellant can take advantage, and no error appears upon its face.

The judgment appealed from is affirmed.

Henshaw, J., and Temple, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[L. A. No. 122. Department Two.—September 25, 1897.]

**JOSEPH FREDERICK, Respondent, v. CITY OF SAN LUIS
OBISPO et al., Appellants.**

DISINCORPORATION OF MUNICIPALITY—MANDAMUS—CALL FOR ELECTION—SUFFICIENCY OF PETITION.—Under the act of 1886 requiring the board of trustees of a city of the sixth class to call an election on the question of disincorporating the municipality, upon receiving a petition in that behalf signed by not less than one-fourth of the qualified electors of the municipality, it is no objection to the sufficiency of the petition that it did not represent the subscribers as qualified electors, but described them only as citizens of the city, if the signers were qualified electors in fact; and where the complaint in *mandamus* to compel the call of the election avers that the petition was signed by the requisite number of qualified electors, it is the fact of the receipt of such a petition, and not the fact that it describes the subscribers as electors, which under the statute imposes the obligation to call the election.

ID.—INQUIRY BY BOARD OF TRUSTEES—QUALIFICATION OF SIGNERS TO PETITION. Whether the names subscribed to the petition were those of electors is matter for consideration by the board; and an affirmative allegation of that fact in the petition would neither preclude nor materially aid the inquiry.

ID.—COMPLAINT FOR MANDAMUS—"PARTY BENEFICIALLY INTERESTED"—OWNER AND TAXPAYER.—It is sufficient in a complaint for *mandamus* to show that the complainant is a "party beneficially interested," within the meaning of section 1086 of the Code of Civil Procedure, to aver that he is a property owner and taxpayer.

APPEAL from a judgment of the Superior Court of San Luis Obispo County. W. B. Cope, Judge.

The facts are stated in the opinion of the court.

W. H. Spencer, for Appellants.

Graves & Graves, for Respondent.

THE COURT.—*Mandamus*. The court below awarded a peremptory writ requiring the board of trustees of San Luis Obispo to call an election on the question of disincorporating the municipality under the act (Stats. 1895, p. 115) to provide for the disincorporation of cities of the sixth class. It is contended on appeal that plaintiff's complaint or affidavit—to which defendant interposed a demurrer—did not make a case for the issuance of the writ.

Said act makes it the duty of the board of trustees to call an election for the purpose stated upon receiving a petition in that behalf signed by not less than one-fourth of the qualified electors of the municipality; and it is objected that the petition presented to the board in this instance was ineffectual because it contained no representation that the subscribers thereto were qualified electors, but described them only as citizens of the city of San Luis Obispo. The objection cannot be sustained. It is shown by averment in the complaint that the petition was signed by the requisite number of qualified electors; and it was the fact of the receipt of such a petition which under the statute imposed the obligation on the board to call an election; whether the names subscribed were those of electors was, of course, a matter for consideration by the board, and an affirmative allegation on the subject in the petition itself would neither preclude nor materially aid the inquiry.

It is contended by appellants that the complaint does not show the respondent to be a "party beneficially interested" within the meaning of section 1086 of the Code of Civil Procedure, and that, therefore, he has no standing to maintain this proceeding; and they rely for this contention upon the doctrine of *Linden v. Alameda County*, 45 Cal. 6. But in the *Linden* case the averment was merely that the petitioner was a qualified elector in the county; while in the case at bar the averments are that the respondent is a resident and elector within said city, "and is the owner of real and personal property therein which is annually taxed for municipal purposes." This distinguishes the case at bar from the *Linden* case, which latter case is the only one to

which our attention has been called in which the petitioner rested merely upon the general allegation that he was an "elector" or a "citizen." Whatever, under the various decisions which have been made on the subject, the law may be in other respects, it is sufficient, at least in a case like the one at bar, to aver that the petitioner is a property owner and taxpayer. (*Hyatt v. Allen*, 54 Cal. 353; *Maxwell v. Supervisors*, 53 Cal. 390; *Eby v. School Trustees*, 87 Cal. 166. See, also, *Wiedwald v. Dodson*, 95 Cal. 450.) There are also other cases in which this court assumed that it was sufficient for the petitioner to aver that he was a property owner and taxpayer.

The judgment appealed from is affirmed.

[Sac. No. 88. In Bank.—September 25, 1897.]

THE PEOPLE ex rel. WARREN F. DREW, Respondent, v.
JOHN B. RODGERS, Appellant.

OFFICE—VACANCY—CHIEF OF POLICE OF SACRAMENTO—ELECTION OF INELIGIBLE PERSON—INCUMBENCY—CONTEST—ANNULMENT OF ELECTION—APPOINTMENT—ELECTION FOR UNEXPIRED TERM.—Where the election of a person to the office of chief of police for the city of Sacramento was contested on the ground that he was not at the time of the election eligible to the office, and, as a result of the contest, his election was declared void and annulled on that ground, while he was an incumbent of the office, his predecessor having surrendered the incumbency to him upon his apparent election and qualification, the decision of a competent tribunal finally declaring his election void, created a vacancy within the terms of subdivision 10 of section 996 of the Political Code, which was properly filled by appointment until the ensuing municipal election, at which an incumbent was properly elected for the unexpired term.

Id.—RIGHTS OF PREVIOUS INCUMBENT—EFFECT OF SURRENDER.—The right of the previous incumbent to hold over until his successor is elected and qualified has no application where he surrendered the incumbency of the office upon the apparent election and qualification of his successor, and he cannot thereafter resume his functions upon the ground that the election of his successor was declared void and annulled on the ground of his ineligibility, after he had entered upon the duties of the office.

Id.—QUO WARRANTO—EVIDENCE—JUDGMENT IN ELECTION CONTEST—DIFFERENT PARTIES—ESTOPPEL NOT MUTUAL.—In an action brought by the attorney general in the name of the people upon relation of the previous incumbent of the office to oust the person elected for the unexpired

term, the judgment rendered in an election contest annulling the previous election of the same person on the ground of ineligibility at suit of another elector, not a party to the quo warranto proceeding, is not admissible in evidence, and cannot estop the defendant from proving his original eligibility. In that proceeding, there being no mutuality in the estoppel of the judgment, which does not bind the people.

LD.—CESSATION OF OFFICE—NEW CITY CHARTER—ABATEMENT—MOTION TO DISMISS—RIGHTS OF RELATOR—DAMAGES FOR USURPATION.—The fact that the office in controversy has ceased through the adoption of a new city charter, is not ground for abatement of the *quo warranto* proceeding, as, under the statute governing the subject, if the relator should be found entitled to the office he would be entitled to recover any damages sustained through usurpation of the office by the defendant, and the prosecution of the proceeding is essential to determine whether he has a right to such damages.

APPEAL from an order of the Superior Court of Sacramento County denying a new trial. A. P. Catlin, Judge.

The facts are stated in the opinion of the court.

Robert T. & William H. Devlin, for Appellant.

Johnson & Johnson, Charles T. Jones, and W. F. Fitzgerald, Attorney General, for Respondent.

HARRISON, J.—At the municipal election of the city of Sacramento, held in March, 1890, the relator was elected to the office of chief of police, and the first section of the act under which he was elected (Stats. 1871-72, p. 243) provided that he should enter upon the duties of his office on the first day of the month next succeeding his election, and should hold his office "for the term of two years, and until his successor is elected and qualified." At the city election in 1892 the appellant received a majority of the votes cast for that office, and, having been duly declared elected, received a certificate of election and entered upon the duties of his office. At the time of his election he was not eligible to the office for the reason that he did not become a citizen of the United States until February 26, 1892, less than ninety days prior to the election. (Pol. Code, sec. 1083.) In a proceeding instituted by an elector of the city contesting his right to hold the office, a judgment was rendered by the superior court of Sacramento county June 17, 1892, setting aside the election by reason of his ineligibility, and an-

nulling the certificate that had been issued to him. This judgment was affirmed on appeal to this court, December 19, 1893. (*Drew v. Rodgers*, 34 Pac. Rep. 1081.) After this judgment had been rendered by the superior court, viz., June 27, 1892, the board of trustees of the city declared that the office was vacant, and appointed the appellant thereto, whereupon he qualified for the office and continued to exercise its duties, and at the municipal election in 1893 he was elected to the office, received his certificate of election, and took the oath of office and filed the bond required by law. The present action was brought in April, 1893, by the attorney general, for the purpose of ousting the defendant from the office and declaring that the relator is entitled thereto. In this proceeding a judgment was rendered by the superior court that the relator had been entitled to the office since April 1, 1890, and that the defendant had since that time illegally intruded into and held the office, and directed that he be excluded therefrom. A motion for a new trial was made upon a statement of the case and denied, and from this order the defendant has appealed.

Section 13 of the aforesaid act of 1872 (Stats. 1871-72, p. 246) authorized the board of trustees of the city to appoint a chief of police, "in case of a vacancy in the office," and provided that the person so appointed should hold the position "until the next city election, at which time a chief of police shall be elected to fill the unexpired term." If, therefore, there was a vacancy in the office on the 27th of June, 1892, the trustees were authorized to make the appointment, and the defendant thereafter was lawfully in the exercise of the duties of the office.

Mechem, in his treatise on Public Offices and Officers, says, section 126: "A vacancy exists when there is no person lawfully authorized to assume and exercise at present the duties of the office." Section 996 of the Political Code declares that "an office becomes vacant on the happening of either of the following events before the expiration of the term. . . . 10. The decision of a competent tribunal declaring void his election or appointment."

The proceedings in the case of *Drew v. Rodgers*, *supra*, were had by virtue of the provisions of section 1111 of the Code of Civil Procedure, which authorizes the right of any person declar-

ed to be elected to an office to be contested: "2. When the person whose right to the office is contested was not at the time of the election eligible to such office." In those proceedings the election of the appellant was declared void and was annulled by reason of his ineligibility to the office; but, inasmuch as he received a majority of the votes cast at the election, the court was not authorized to declare that any other person was elected. (*Saunders v. Haynes*, 13 Cal. 145; *Searcy v. Grow*, 15 Cal. 118; *Crawford v. Dunbar*, 52 Cal. 36.) There were thus presented the precise circumstances contemplated by the above provision of the Political Code. The election of the defendant had been contested on the ground that he was ineligible to the office, and a competent tribunal had decided that the election was void. The defendant was up to that time in the incumbency of the office, and in the exercise of its duties by virtue of his election. The term for which his predecessor had been elected had expired, and his predecessor, instead of contesting the right of the appellant to hold the office, had ceased to perform its duties, and could not thereafter be required to resume its functions. Whether, if the relator had continued to hold the office, and had himself contested the right of the appellant thereto, he would be entitled to remain in possession after the judgment of the court until the election of a successor, is a question that does not arise in the present case, and need not be determined. His surrender of the office to defendant, and the subsequent judgment of the court that the election of the defendant was void, created a vacancy which was to be filled by appointment, and, after this vacancy had been filled by the appointment of another, the person so appointed became entitled to hold the office until it should be filled by another election, and authorized the election of the appellant for the unexpired term at the city election in 1893. The provision in the first section of the aforesaid act that the chief of police should hold office until his successor should be elected and qualified had no application. An election to fill the office, regular in all respects, had been held, and the electors of the city had at that election chosen the defendant by a majority of their votes to be the successor of the relator, and he had qualified for the office and entered upon its duties. By reason of certain extrinsic facts he was held not to be entitled to retain

the office; but he had nevertheless been elected as the successor of the relator, and had qualified for the office and entered upon its duties. In *People v. Tilton*, 37 Cal. 614, it was held that the incumbent was entitled to continue in office, and that there was no vacancy to be filled by the governor, for the reason that the legislature had failed to make an election. That case, therefore, and others dependent upon it, are inapplicable to the facts of the present case.

The court erred in admitting in evidence the judgment-roll in the case of *Drew v. Rodgers*, *supra*, and in holding that the defendant was estopped thereby from proving that he had been a citizen of the United States for more than ninety days prior to the election in March, 1892. The judgment was not between the parties to the present action, nor was it between the relator and the defendant. If the judgment in that action had been in favor of the defendant, the people would not have been precluded in the present action from showing that he was not in fact a citizen at the date of the election, and there would be, therefore, no mutuality in the estoppel of the judgment. It would open the door to collusion to hold that any elector, by contesting the validity of an election, could bind the people by suffering a judgment in favor of its validity.

On the 1st of January, 1894, a new charter for the city of Sacramento went into effect, and as the trial of the present proceeding was not had until after that date the defendant asked its dismissal upon the ground that the office involved herein, as well as its term, had ceased to exist. The court rightly denied the motion. Under the statute governing the subject, if the relator should be found entitled to the office, he would be entitled to recover any damages which he might have sustained by reason of its usurpation by the defendant (Code Civ. Proc., sec. 807), and the prosecution of the proceeding is essential to determine whether he has a right to such damages. Where a proceeding of this nature is instituted during the term in which the usurpation is alleged to exist, the action does not abate merely by reason of a failure to bring it to a judgment before the expiration of such term. (See *People v. Hartwell*, 12 Mich. 508; 86 Am. Dec. 70; *State v. Pierce*, 35 Wis. 93; *People v. Loomis*, 8 Wend. 396; 24 Am. Dec. 33; *Commonwealth v. Smith*, 45 Pa. St. 59.)

The order denying a new trial is reversed.

Garoutte, J., Temple, J., and Henshaw, J., concurred.

McFarland, J., dissented, and adhered to opinion delivered in Department.

The following is the opinion rendered in Department Two on the 6th of November, 1896, referred to by Mr. Justice McFarland:

BRITT, C.—Action for the usurpation of an office. It was commenced by the attorney-general as early as April 29, 1893, and brought to trial February 7, 1894. By its judgment the court declared that the relator, Drew, is entitled to the office of chief of police in the city of Sacramento, and has been so entitled since the 1st day of April, 1890; that defendant Rodgers usurps and intrudes into such office, and has wrongfully held the same and exercised its functions since April 1, 1893; that the relator be admitted and restored to such office, and that defendant be ousted and excluded therefrom.

Drew was elected to said office at the city election held in March, 1890, for the term commencing April 1st following, under a statute providing that he should hold "for the term of two years and until his successor is elected and qualified." (Stats. 1871-2, p. 243.) The same act (p. 246) provided that in case of a vacancy in the office the board of trustees of the city might fill the same by appointment until the next city election, at which time a chief of police should be elected for the unexpired term.

At the city election in March, 1892, Rodgers received a majority of the votes cast for said office, and the proper canvassing board declared him elected thereto for the term next ensuing; but on June 17, 1892, in a proceeding to contest his right, instituted in the superior court under section 1111 of the Code of Civil Procedure, he was adjudged to be ineligible to the office by reason of alienage, and his election was annulled; he appealed, and the judgment was affirmed by this court in December, 1893. (*Drew v. Rodgers*, 34 Pac. Rep. 1081.) However, in April, 1892, he forcibly dispossessed the relator of said office, and thenceforward performed its duties; but the relator was at

all times ready and willing to perform them, and claimed to be the lawful incumbent.

The difficulty of Rodgers' alienage having been removed by his naturalization, the board of trustees of the city, on June 27, 1892, in form appointed him chief of police to hold until the next city election; this on the assumption that a vacancy existed in the office; and at the next election in March, 1893—not the regular time for electing to the office in question—he was again the person receiving the highest number of votes for said office, and was declared elected accordingly. In January, 1894, the new charter of the city of Sacramento went into operation; by its provisions the office of chief of police was created, but made appointive instead of elective, and it is conceded that the office of that name previously existing was abolished. (Stats. 1893, pp. 588, 611.)

Appellant contends that by his formal election and qualification in March, 1892, a successor to the relator in said office was elected and qualified within the meaning of the statute permitting the latter to hold over until the occurrence of that event and after the expiration of his prescribed term of two years, and that thus such contingent right of the relator to a prolongation of his term was cut off. We differ with appellant; ineligibility for an office means incapacity to be elected or otherwise chosen thereto; Rodgers was affected with such incapacity in March, 1892, and the votes cast for him were "ineffectual for the purpose of an election." (*Saunders v. Haynes*, 13 Cal. 154; *Dryden v. Swinburn*, 20 W. Va. 137, and cases cited.) There being thus a failure to elect a successor to the relator, the contingency arose upon which he had the right to an extension of his original term. It is claimed that the whole matter is disposed of in appellant's favor by the decision in *People v. Ward*, 107 Cal. 236; but in that case—in which the writer was of counsel—the successor had been duly elected and had properly qualified, and the question presented differed widely from that involved here. It results that the alleged appointment of defendant to the office on June 27, 1892, was void because there was then no vacancy. (*People v. Tilton*, 37 Cal. 614; *People v. Edwards*, 93 Cal. 153.) And for the same reason the election of Rodgers for the unexpired term in March, 1893, was

void; the statute requiring an election for this office in the even-numbered years and permitting it at other times only in case of a vacancy. (Stats. 1871-72, pp. 243, 246.)

The court rightly refused the offer of evidence at the trial that while defendant was yet a minor his mother was married to a citizen; the object being to show that he was really eligible for the office in March, 1892, although the precise matter had been put in issue in the previous case of *Drew v. Rodgers, supra*, and decided against him; the judgment-roll in that action was in evidence at the trial of this. True the parties and the causes of action are not identical; and Drew, the contestant in that case, was a different person from the relator here; but that was a proceeding prosecuted for the purpose of trying the very question whether Rodgers' election was not void because of his ineligibility (Code Civ. Proc., sec. 1111); it was a matter of public concern (*Lord v. Dunster*, 79 Cal. 477) involving the political and legal relations of the contestee, and we see no reason to doubt that the nullity of his election there determined was conclusive upon him in the present action. (Code Civ. Proc., sec. 1908, subd. 1.)

It is further argued that the court should have dismissed the proceeding, or have granted a nonsuit, because by the new charter of the city the office in controversy had been abolished before the case came on for trial. Under the statute governing the subject, the removal of the usurper is not the sole object which is, or may be, accomplished by the proceeding; judgment may be rendered upon the right of the defendant and also upon the right of the party, if any, alleged to be entitled to the office; if against the defendant, he must pay the costs, and, at the court's discretion, a fine; it is also the foundation of a recovery by the rightful claimant of damages occasioned by the usurpation. (Code Civ. Proc., secs. 805, 807, 809.) When, as in this instance, the action has been brought during the usurpation, and such consequences may flow from the judgment, it ought not to be held that the action must abate merely because efflux of time, or other circumstance which does not toll the legal wrong of the intrusion, has put a period to the disputed term. And to this effect is the decided preponderance of authority. (*People v. Hartwell*, 12 Mich. 508; *State v. Pierce*, 35

Wis. 93; *Hunt v. Chandler*, 45 Mo. 452; *People v. Loomis*, 8 Wend. 396; *Commonwealth v. Jackson*, 45 Pa. St. 59.) Some cases cited by appellant—to which may be added *Hurd v. Beck* (Kan.), 45 Pac. Rep. 92—are distinguishable; they proceed on the assumption that after the expiration of the usurped term no substantial right was involved.

The judgment is not in form appropriate to the state of the case at the time of trial—the office having been abolished; but it cannot be corrected on this appeal, which is from an order denying a motion for a new trial only. There is no error in the record available to defendant, and the order appealed from should be affirmed.

[S. F. No. 110. In Bank.—September 27, 1897.]

J. J. RAUER, Appellant, v. E. W. WILLIAMS, Clerk, etc.,
Respondent.

CONSTITUTIONAL LAW—INVALID STATUTE—MODE OF PAYING FEES—ARBITRARY CLASSIFICATION—SPECIAL LEGISLATION—ACCOUNTABILITY OF OFFICERS FOR FEES.—The act of 1893, p. 127, providing and regulating the manner of receiving and paying fees, etc., in cities and cities and counties having a population of over one hundred thousand inhabitants, and prescribing the duties of officers with reference thereto, and requiring a certificate to be issued by an officer of whom service is demanded, to be delivered to the treasurer with the required fees, and that a receipt for the money from the treasurer be returned to such officer before the required service can be performed, is not intended for the convenience of the public, but for the protection and security of the municipality. Such act is unconstitutional and invalid for being based upon an arbitrary distinction, there being no reason why attempted protection should be accorded to a city of one hundred thousand inhabitants, and not to one of less population, and for being special legislation in a case where a general law can be made applicable, and also for violating the constitutional requirement that the legislature, by general and uniform laws, shall provide for the strict accountability of officers for all fees which may be collected by them.

ID.—CLASSIFICATION OF MUNICIPAL CORPORATIONS—RELATION TO SPECIAL LEGISLATION.—The object of classifying municipal corporations according to population, and forbidding their creation by special laws, was to avoid the necessity of special legislation; and the legislature cannot pass laws touching the organization and incorporation of municipalities, except by conforming to the requirements of the classification act; but, upon other matters, it may pass general and uniform laws applicable either to municipal corporations of a given class, or to all of a separate class created by and designated in the act itself, provided some plain reason appears for the limitation to a class where

the law does not apply to all municipalities within the same general category: yet a law is not necessarily a general law merely because it operates upon all municipalities within a specified class, and it is special if it applies merely to all within a class, without reason appearing why it is not made to apply generally to all municipal corporations.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

George H. Perry, and Henry E. Monroe, for Appellant.

The act of 1893 is unconstitutional as being special legislation. (*Welsh v. Bramlet*, 98 Cal. 219, 227.) An arbitrary classification cannot be used as a pretext for special legislation. (*Dougherty v. Austin*, 94 Cal. 601, 620; *Darcy v. Mayor etc. of San Jose*, 104 Cal. 642, 645; *Pasadena v. Stimson*, 91 Cal. 238; *Earl v. Board of Education*, 55 Cal. 489; *San Luis Obispo v. Graves*, 84 Cal. 71.)

Harry T. Creswell, and W. I. Brobeck, for Respondent.

The act of 1893 is a general law, because its provisions apply uniformly to all municipalities of a class which have occasioned the legislation to which the act has reference. (*Randolph v. Word*, 49 N. J. L. 85; *People v. Central Pac. R. R. Co.*, 105 Cal. 576-84; *People v. Henshaw*, 76 Cal. 445, 446; *Cody v. Murphey*, 89 Cal. 524; *Welsh v. Bramlet*, 98 Cal. 226; *Pritchett v. Stanislaus County*, 73 Cal. 312; *State v. Wofford*, 121 Mo. 61; *McClay v. Lincoln*, 32 Neb. 412; *Hunzinger v. State*, 39 Neb. 653.)

HENSHAW, J.—This action is to compel the defendant, Williams, as clerk of the justice's court of the city and county of San Francisco, to accept fees tendered to him by plaintiff, who was about to commence an action in said justice's court. Defendant refused to accept the fees, and plaintiff proceeded with his action in mandate to compel him to do so. To the complaint in mandate the defendant made answer, basing and justifying his refusal upon an act of the legislature passed in 1893. The validity or invalidity of this act is the sole question presented on this appeal.

In 1893 the legislature passed an act entitled, "An act to provide and regulate the manner of receiving and paying fees, com-

missions, percentages, and other compensation for official services in cities and cities and counties having a population of over one hundred thousand inhabitants, and prescribing the duties of officers with reference thereto." (Stats. 1893, p. 127.)

The refusal of the justice's court clerk to accept the fee was based upon the terms of this act, which provides a new scheme for the collection of fees and commissions. By its provisions the various officers no longer collect and receive the fees, but they are required to give to the person demanding of them a service a receipt or acknowledgment, stating the nature of the service to be rendered, and the amount which by law is due therefor. This receipt or certificate is then to be taken by the demandant to the treasurer, and to him delivered with the money called for therein. The treasurer in turn issues his receipt, which must in like manner be taken to the officer, who issues a second certificate to the demandant, and thereupon and thereafter the services are to be performed.

It is to be noted that the act in question conforms to the provisions of the "Act classifying municipal corporations" (Stats. 1883, p. 24), and is made to apply to municipal corporations of the first class created therein. But against this the contention is, that this classification was created only for the purpose of the municipal corporation bill (Stats. 1883, p. 93), and is, therefore, applicable only to those cities which have adopted charters in conformity with the provisions of that act. It is further insisted that even if this be regarded as untenable, nevertheless the legislature, under article XI, section 6, of the constitution, can classify municipal corporations, and pass only such laws regarding them as affect their incorporation and organization, and that this is not such law.

It was the unquestioned design of the framers of the constitution to prevent on the part of the legislature a practice, therefore permissible, of singling out a particular town or city and passing legislation directly affecting it and no other. It was believed that the exercise of this power by the legislature led to abuses, and that a constitutional provision relieving cities from this particular form of legislative control and preserving to them their autonomy unimpaired except by general legislative action, would better subserve the purposes of good government.

Therefore, in the case of those municipal corporations known as counties, the constitution permitted a classification by population only for the purpose of fixing the compensation of officers, and strictly insisted that the system of county governments should be uniform throughout the state (Const., art XI, sec. 4), and that the duties of the officers recognized by this system should likewise be prescribed by general and uniform law. (Const., art. XI, sec. 5.) It further declared that by general and uniform laws the legislature should provide "for the strict accountability of county and township officers for all fees which may be collected by them, and for all public and municipal moneys which may be paid to them or officially come into their possession."

When it came to treat of the other class of municipal corporations, cities or cities and counties, and towns, it provided as follows: "Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." (Const., art. XI, sec. 6.) (Though this section has since been amended, such was its wording at the time these questions arose.)

Still further to emphasize its policy it set forth in article IV, section 25, thirty-two subjects upon which local legislation or special laws were inhibited, and in subdivision 33, as an "*omnium gatherum*," forbade the legislature from passing such laws "in all other cases where a general law can be made applicable."

These provisions plainly indicate, however, that the constitution does not mean to deprive the legislature of the power to pass laws affecting municipal corporations, but only to insist that such laws as may be passed shall be of general application, to avoid the evil spoken of. It is, therefore, entirely too narrow a view to say that the power to classify cities conferred upon the

legislature in article XI, section 6, means the power to classify them only for the purpose of regulating their incorporation and organization, for at the time the constitution went into effect nearly all of the present cities and towns of the state, and absolutely all which are of much importance by reason of their wealth and population, were already incorporated and organized. The power to classify, which is thus conferred, would be meaningless unless the classifications made were to be employed by the legislature for the purpose of supplying the general laws required by the varying needs of the municipalities so classified. If the view which appellant takes is to prevail, then, as San Francisco at the time of the adoption of the constitution was incorporated and organized, if the needs of San Francisco, and cities or cities and counties of its class, should demand the creation of five new police courts, a legislative enactment to that effect could not become a law unless it likewise imposed upon every city in the state the same number of courts.

The other view, which is the interpretation long given to this provision of the constitution by this court, empowers the legislature, under restrictions hereafter to be considered, to pass laws regulating and affecting the incorporation and organization of municipalities under the classification act of 1883, and, if the laws so passed be otherwise unobjectionable, they will not be held invalid as special laws because they apply to the needs of only one or another or several of those classes.

"The manifest object of classifying municipal corporations according to population, and in preventing their creation by special laws, as provided by section 6, of article XI, of our constitution, was to avoid the necessity of special legislation. That cities containing a large population require different legislation from those composed of a few hundred inhabitants is evident. To so classify them that general laws applicable to these separate classes will meet the necessities of the case was a wise provision, and a law which applies to one or more, but not to all, of these classes is not for that reason special legislation." (*People v. Henshaw*, 76 Cal. 436; *Cody v. Murphey*, 89 Cal. 522.)

The essential distinction thus to be observed between the power of the legislature when dealing with counties and that when dealing with cities, cities and counties, or towns, is that

in the former case the legislature has not general authority to classify counties by population for purposes of legislation, and is authorized to make such classification only for the purpose of regulating the compensation of county officers, while in the latter case the constitution, recognizing the greater intricacy in the system of government of cities, and their divergent and varying needs, has permitted them to be classified by population for purposes of legislation touching their incorporation and organization.

The latest utterances of this court upon the question are found in *Darcy v. Mayor etc. of San Jose*, 104 Cal. 642. Therein the act of March 3, 1883, classifying the cities, is considered, and it is said: "Section 6, article XI, was evidently intended to limit and not to enlarge the power of the legislature, and I think it was intended that the classification there authorized was to be by a general law in the same sense and in the same way in which it was necessary to provide for the incorporation and organization of cities and towns. Legislation in regard to such incorporations would thereafter be made by reference to the classes thus made."

In *Pasadena v. Stimson*, 91 Cal. 238, it is said: "It is true the legislature is empowered by section 6, of article XI, of the constitution, to classify cities and towns in proportion to population for the purpose of incorporation and organization, and it is undoubtedly true that a law limited to these purposes is not unconstitutional because it makes different regulations for the different classes."

But, while it is thus seen that all municipalities within the state are subject to the operation and control of general laws under the classification act of 1883, provided those laws affect their incorporation and organization, and while it is further seen that a law touching upon matters of incorporation and organization will not be held to be a special law because it operates only upon one or several of the classes, it does not follow that there may not be legislation not affecting incorporation or organization which will be general without reference to the classification act of 1883. To hold otherwise would deprive of all efficacy and utility the last clause of section 6, article XI, of the constitution, which declares that "cities and towns heretofore or

hereafter organized shall be subject to and controlled by general laws."

To illustrate: The legislature might desire to allow all seaboard cities to provide outlets for their sewers in the ocean. Such outlets, unless permitted or sanctioned by the legislature, might be held purprestures. It would be meaningless for the legislature to declare that all cities of the first class, or of the second class, or of the third class, might provide such outlets, for of the municipalities in the enumerated classes many might be inland cities. A law providing that all seaboard towns and cities may provide such outlets for their sewers would neither conform to the classification act of 1883, nor would it apply to all municipalities within the state; but it would still apply to all within the class thus created by the act itself, that is to say, to all similarly situated, and would be a general law contemplated and permitted by the portion of section 6, article XI, of the constitution, just quoted.

Or again: Instancing a narrower case, a law of the legislature affecting all cities within the state which are ports or subports of entry, and providing a state quarantine system therefor, would not conform to the classification act, and such a law would not apply, because it would be needless to make it apply, to all seaboard cities, but it would apply to all cities within the designated class, and such an act likewise would unhesitatingly be upheld as within the scope of section 6 of article XI.

It may be concluded, therefore, that while the legislature cannot pass laws touching the organization and incorporation of municipalities, except by conforming to the requirements of the classification act, upon matters not affecting the incorporation or organization (as in the instances above given), it may pass laws which will be general if they operate uniformly and generally upon all cities of the class created by and designated in the act itself.

The act under consideration, therefore, is not to be condemned merely because it applies to cities and cities and counties of the first class, for, as has been said, it may apply to but one class and still be a general law. But when a law is so made to apply to a class, and not to all within the same general category, plain reason must appear for the limitation. It by no means follows

that a law is a general law because it operates upon all within a class. It is still special if it applies to all within a class, without reason appearing why it is not made to apply generally to all. (*Pasadena v. Stimson*, *supra*; *Darcy v. Mayor etc. of San Jose*, *supra*; *Ex parte Jentzsch*, 112 Cal. 468.)

All laws of a general nature shall have a uniform operation (Const., art. I, sec. 2), and the legislature is required by general and uniform laws to provide for the strict accountability of county officers for all fees which may be collected by them. (Const., art. XI, sec. 5.) This provision is not inconsistent with the provisions of the constitution applying to cities alone, and is, therefore, applicable to cities and counties. (Const., art. XI, sec. 7; *Kahn v. Sutro*, 114 Cal. 316.)

The manifest purpose of the act in question is to provide a scheme for the collection of fees, which the legislature believed would be better and safer than the one in operation. Clearly the law is not designed for the convenience of the public, but for the protection and security of the municipality. But this being so, there is no inherent reason, and no reason at all, why this attempted protection should be accorded to a city of over a hundred thousand inhabitants, and not to one of less population. It will not be said that there is danger of peculation and misappropriation of funds in the one case, and no danger in the other. There is, therefore, nothing in the law itself, no inherent reason shown, why it should be made applicable to one class and not to all. In addition it violates the express constitutional mandate requiring, by general laws, a strict accountability of officers for all fees; and finally, it is a special law, passed in a case where a general law is applicable. There is, then, no natural, or intrinsic, or constitutional distinction warranting the act in question, while there are express constitutional inhibitions against it.

The conclusion reached renders unnecessary the consideration of other objections presented by appellant, but for the reasons given the judgment is reversed and the cause remanded, with directions to the trial court to enter judgment upon the pleadings in favor of plaintiff.

McFarland, J., Temple, J., Harrison, J., Van Fleet, J., and Garoute, J., concurred.

[Crim. No. 268. In Bank.—September 28, 1897.]

THE PEOPLE, Respondent, v. WILLIAM H. BRITTAN, Appellant.

CRIMINAL LAW—HOMICIDE—SELF-DEFENSE—CONVICTION OF MANSLAUGHTER—CONFLICTING EVIDENCE—APPEAL.—A verdict for manslaughter will not be disturbed upon appeal, when the evidence is conflicting as to whether the homicide was or was not committed in self-defense, and there is enough evidence for the prosecution to warrant the verdict, and no such disparity appears in the statement of the witnesses for the prosecution as to render their evidence inherently improbable or necessarily unworthy of belief.

ID.—INSTRUCTIONS—BURDEN OF PROOF—DEGREE OF PROOF REQUIRED—REASONABLE DOUBT.—An instruction that "an unlawful killing must be proven by the state before the defendant can be convicted of any offense, whether murder or manslaughter," is not erroneous in not defining the degree of proof necessary to authorize conviction, and in leaving the jury to infer that a mere preponderance in the evidence would be sufficient, when it appears that the court elsewhere repeatedly stated the principle that guilt must be established beyond a reasonable doubt.

ID.—INSTRUCTIONS TO BE CONSTRUED TOGETHER—ISOLATED SENTENCE—OMISSION ELSEWHERE SUPPLIED.—The entire charge of the court must be construed together, and error cannot be predicated upon an omission in an isolated sentence or phrase which is elsewhere supplied; and it is sufficient if the charge as a whole fairly covers all that is pertinent to the case, stated consistently and harmoniously.

ID.—DEFINITION OF REASONABLE DOUBT—EXCLUSION OF RATIONAL HYPOTHESIS—ABSENCE OF REQUEST.—Where the ordinary definition of reasonable doubt is correctly given, the omission to tell the jury that the guilt of the defendant should be inconsistent with every other rational hypothesis is not erroneous, in the absence of a request that it be given.

ID.—RIGHT OF COURT TO STATE EVIDENCE.—The court has a right to state the evidence for the purpose of pointing its instruction and making its pertinency apparent to the jury, if it assumes no fact as proven, and states nothing by way of argument thereon, nor anything calculated expressly or by implication to indicate a shifting of the burden of proof to the defendant.

ID.—CHALLENGE OF JUROR—IMPROPER QUESTION.—A defendant charged with murder has no right in impaneling a jury to ask a juror how many murder cases he had sat on as a juror, either for the purpose of showing actual bias, or for the purpose of determining whether to challenge peremptorily.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—ABSENCE OF EXCEPTION.—Where there was no objection made nor exception taken to alleged misconduct of the district attorney, it cannot be reviewed upon appeal.

ID.—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE—CUMULATIVE PROOF.—A new trial cannot be granted for newly discovered evidence, where the affidavits in support of the motion do not make a showing of diligence, and the newly discovered evidence appears to be merely cumulative to proof given upon the trial.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William T. Wallace, Judge.

The facts are stated in the opinion of the court.

James A. Devoto, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

VAN FLEET, J.—Defendant was convicted of manslaughter in killing one Phillip A. Reilley, and appeals from the judgment and an order denying him a new trial.

1. Defendant's contention that the verdict is not sustained by the evidence is not maintainable. The killing was admitted by defendant, his defense being that it was committed in necessary self-defense. There is a conflict in the evidence as to whether defendant or the deceased started the difficulty which ended in the homicide. The trouble commenced in a saloon, and ended on the sidewalk outside. The evidence all shows that, when the parties reached the sidewalk, the defendant was knocked down or thrown down by deceased, and that while the deceased was on top of defendant on the sidewalk the latter was very roughly handled, partly by deceased and partly by a companion named Cunningham, the latter kicking the defendant several times about the head and face while he was being held down by deceased. Deceased finally permitted defendant to get up, upon the latter saying that he had enough and did not want to fight. On getting to his feet defendant backed out some eight or ten feet from the sidewalk into the street; and at this point a very sharp conflict arises as to the subsequent events. The evidence of the prosecution tends to show that when deceased let defendant up, deceased started to look for his hat, which had fallen off in the scuffle, and that while he was thus engaged, and making no further hostile demonstration toward defendant, the latter suddenly drew a pistol, and saying, "Take that, you son of a bitch," or some like expression, fired the fatal shot; while that of the defense would tend to show that after letting defendant up, deceased still continued to challenge and dare him to fight, and was advancing upon him in a menacing manner, when defendant

drew his weapon and fired. There was no pretense that deceased at any time threatened or made any movement to use a weapon, nor does the evidence show that he was armed; but it is conceded that he greatly overmatched defendant in size and strength. It is apparent from this statement that, although conflicting, there was certainly evidence to warrant the verdict, and we cannot, therefore, disturb the finding of the jury.

Nor was there, as claimed, any such disparity in the statements of the witnesses of the prosecution as to render their evidence inherently improbable or necessarily unworthy of belief. It was no greater, in fact, than is usually to be found in the statements of different eyewitnesses to an affair of the kind.

2. After instructing the jury as to the constituent elements of murder and manslaughter, the trial judge prefaced that portion of his charge defining the law of self-defense with this sentence: "You observe, therefore, that an unlawful killing must be proven by the state before the defendant can be convicted of any offense, whether murder or manslaughter." This language is extracted from its context, and upon it defendant bases the objection that it is erroneous as not defining the *degree* of proof necessary to authorize conviction, and as leaving the jury to infer that a mere preponderance in the evidence would be sufficient. But elsewhere in the charge, and in several instances, the court did correctly state the principle that guilt must be established beyond a reasonable doubt. It should hardly be necessary to reiterate a rule of construction so thoroughly settled and familiar, that the entire charge shall be read and taken together; that you cannot pick out an isolated sentence or phrase and predicate error of some omission which is elsewhere supplied. It being impracticable to state all the various principles of law applicable to a case in one breath, or a single sentence, it is sufficient if, as a whole, the charge fairly covers all that is pertinent to the case, stated consistently and harmoniously. The present charge is not obnoxious to this requirement.

3. The definition of reasonable doubt was correctly given, and the omission in that connection to tell the jury that "the guilt of the defendant should be inconsistent with every other rational hypothesis" was not, in the absence of a request that it be given, erroneous. There is nothing holding to the contrary in *People v. Gosset*, 93 Cal. 641.

4. Defendant complains in a very general way of portions of the charge as improperly discussing the facts and as being argumentative, and that the court by its language "has attempted to shift the burden of proof from the people to the defendant." The objectionable parts are referred to by reference to the page and folio, but counsel has not attempted, by argument or suggestion, to point out wherein the language of the charge is in any respect open to the criticism made, and we have not been able to discover it. A careful reading of the charge discloses no transgression of the right of the court to state the evidence, the purpose of which would seem to have been solely that of pointing its instructions and making their pertinency apparent to the jury. It assumes no fact as proven, and contains nothing in the way of argument thereon, nor anything calculated either expressly or by implication to indicate a shifting of the burden of proof to defendant.

5. The other points made do not require extended notice. There was no error in refusing defendant the right to ask the juror O'Connor how many murder cases he had sat on as a juror. It did not tend to show actual bias, and was not permissible for the purpose of determining whether to challenge peremptorily. (*People v. Hamilton*, 62 Cal. 377, 388.)

As to the misconduct of the district attorney, there was no objection made nor exception taken and it cannot be reviewed. (*People v. Kramer*, 117 Cal. 647.)

The affidavits in support of the motion for a new trial on the ground of newly discovered evidence do not make a showing either of diligence or as to the character of the evidence which would justify our interference with the order of the trial court on that ground. There was evidence before the jury warranting the inference that deceased and Cunningham went to the saloon looking for defendant to do him harm; and the newly discovered evidence was therefore merely cumulative.

We find no error in the record, and the judgment and order are affirmed.

Garoutte, J., Harrison, J., McFarland, J., Temple, J., and Henshaw, J., concurred.

Rehearing denied.

[S. F. No. 630. Department One.—October 1, 1897.]

**ERNESTINE KRELING, Respondent, v. F. W. KRELING,
Appellant.**

ACTION—SPECIFIC PERFORMANCE OF CONTRACT—FORECLOSURE OF LIEN—JURISDICTION OF EQUITY—SETTLEMENT OF ADMINISTRATRIX WITH SURVIVING PARTNER—CONVEYANCE—ASSUMPTION OF FIRM DEBT—LIEN UPON PROPERTY CONVEYED.—A court of equity has jurisdiction of an action for the specific performance of a contract, and for the foreclosure of a lien upon real property conveyed by the administratrix of a deceased partner to the surviving partner, under a written agreement of settlement between them, which was approved by the probate court, and by the terms of which it was agreed, among other things, that the surviving partner should assume and pay the notes of the firm to a bank, which indebtedness was made a charge or lien upon the property conveyed; and it is immaterial to the jurisdiction of equity to enforce the lien, in such case, whether the action for specific performance of the agreement could be maintained alone or not.

ID.—PRINCIPAL AND SURETY—ACTION BY SURETY TO ENFORCE PAYMENT BY PRINCIPAL—PREVIOUS PAYMENT NOT ESSENTIAL.—By the assumption of the firm notes to the bank by the surviving partner, he became the principal debtor, as between himself and the estate of the deceased partner, and that estate became a surety; and the administratrix of that estate was authorized to bring an action to enforce payment of the notes by the principal without first making payment herself.

ID.—CONSTRUCTION OF AGREEMENT—CREATION OF LIEN.—A lien is a charge imposed upon specific property and may be created by contract of the parties, or by operation of law; and the provisions of an agreement that property to be conveyed by the administratrix of the deceased partner to the surviving partner was to be chargeable only with the debts of the firm, excepting an indebtedness to a bank, which the surviving partner agreed to assume and pay, are to be construed as making the payment of that indebtedness a charge or lien upon the property conveyed, and such charge or lien was not rendered ineffectual by the fact that the property had not been conveyed at the date of the agreement, but the lien agreed for attached from the time of the conveyance of the property pursuant to the terms of the agreement.

ID.—CAPACITY OF ADMINISTRATRIX TO SUE—PLEADING—DEMURRER—CURE OF DEFECT IN ANSWER.—If the complaint by an administratrix is defective in not stating that the plaintiff was appointed administratrix by order and decree of the court, "duly given or made," such defect is cured where the defendant has not only recognized and recited in an agreement signed by him the representative capacity of the plaintiff, but has also described the plaintiff as administratrix of the estate in his answer; and the fact that a demurrer for want of capacity of the plaintiff to sue has been erroneously overruled will not prevent the curing of the defect in the complaint by the averments of the answer.

- ID.—NONJOINDER OF DEFENDANTS—SEVERAL LIABILITY.**—Where the defendant is severally liable to the action brought against him, an objection that there is a nonjoinder of parties defendant cannot be sustained.
- ID.—DEFECTIVE DEMURRER—SPECIFICATION OF NONJOINDER.**—A demurrer for nonjoinder of parties is defective and insufficient, when it does not contain the necessary specification of what parties should have been joined, or in what the nonjoinder consists.
- ID.—FORM OF DECREE—PAYMENT OF MONEY TO BANK BEFORE SALE—ORDER OF SALE OF ONE PARCEL.**—The defendant cannot object to the form of a decree enforcing a lien against him upon property conveyed to him as surviving partner, for indebtedness of the firm to a bank assumed by him, that he is permitted by the decree to discharge the obligation by paying off the indebtedness to the bank before a sale of the property is had, nor that the money is to be paid to the bank, rather than to plaintiff for the use of the bank, nor that one of the parcels of land only was specifically designated for sale, he being personally liable for the whole amount of the indebtedness.
- ID.—APPOINTMENT OF COMMISSIONER TO SELL PROPERTY.**—The court has authority, under sections 187 and 726 of the Code of Civil Procedure, to appoint a commissioner to sell the property upon which a lien is to be enforced.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion.

Thomas A. McGowan, and F. H. Smithson, for Appellant.

The plaintiff does not show capacity to sue as administratrix. There is no sufficient allegation of the appointment of plaintiff as administratrix, by an order duly given or made. (*Barfield v. Price*, 40 Cal. 535; *Young v. Wright*, 52 Cal. 407; Code Civ. Proc., sec. 456; *Judah v. Fredericks*, 57 Cal. 389.) Plaintiff has an adequate remedy in law, and cannot maintain this action for specific performance. (3 Pomeroy's Equity Jurisprudence, sec. 1401; Pomeroy's Specific Performance, secs. 47, 48.) The right to a specific performance only exists where the remedy is mutual. (*Duvall v. Myers*, 2 Md. Ch. 401; Pomeroy's Specific Performance, secs. 163, 166; Civ. Code, sec. 3386; *Sturgis v. Galindo*, 59 Cal. 28; 43 Am. Rep. 239; *Vassault v. Edwards*, 43 Cal. 464; *Cooper v. Pena*, 21 Cal. 403; *Butman v. Porter*, 100 Mass. 337; *Sullings v. Sullings*, 9 Allen, 234.)

H. H. Lowenthal, for Respondent.

It is competent for the parties to create a lien by contract.

(*Dingley v. Bank of Ventura*, 57 Cal. 467; Civ. Code, secs. 2872, 2881, 2920.) A suit to enforce the lien is the appropriate remedy (*Waters v. Bossell*, 58 Miss. 602), and it was not necessary that respondent should have first paid the indebtedness to the bank. (1 Jones on Mortgages, sec. 769.) The lien sought to be enforced is strictly equitable (1 Pomeroy's Equity Jurisprudence, sec. 167), and the jurisdiction is necessarily in equity. (1 Jones on Mortgages, sec. 761a.) Appellant became principal debtor, and respondent the surety. (*Tulare County Bank v. Madden*, 109 Cal. 312; *Hopkins v. Warner*, 109 Cal. 133.) Respondent being a surety had a right to enforce the obligation against the principal to pay the debt assumed. (*Abell v. Coons*, 7 Cal. 105; 16 Am. Dec. 229; *Cubberly v. Yager*, 42 N. J. Eq. 289; *Marsh v. Pike*, 10 Paige, 595; *Cornell v. Prescott*, 2 Barb. 19; *Waters v. Bossell*, *supra*; 1 Jones on Mortgages, sec. 761a.) The court had power to appoint a commissioner to make sale of the property. (*Mayer v. Wick*, 15 Ohio St. 548; Code Civ. Proc., secs. 187, 726.) The decree would have been erroneous if it had ordered the money paid to plaintiff. (*Waters v. Bossell*, *supra*.) Any defect in the complaint respecting the representative capacity of plaintiff is cured by the answer, when her representative capacity is alleged, even though it was error to overrule the demurrer. (*Shively v. Semi Tropic etc. Co.*, 99 Cal. 259; *Cohen v. Knox*, 90 Cal. 266; *Daggett v. Gray*, 110 Cal. 169.) The objection to the nonjoinder of parties was correctly overruled, the liability of defendant being several as well as joint (Code Civ. Proc., sec. 383), and the demurrer does not specify wherein the nonjoinder exists. (Code Civ. Proc., sec. 431; *O'Callaghan v. Bode*, 84 Cal. 495.)

BELCHER, C.—On December 15, 1893, William Kreling died intestate in the city and county of San Francisco, leaving as his sole heirs at law the plaintiff, who was his wife, and the defendant, who was his father. In January, 1894, the plaintiff was appointed administratrix of his estate, and thereupon duly qualified and entered upon the discharge of her duties as such. Prior to and at the time of his death he was in partnership with his father, engaged in various enterprises, and, among others, in the business of manufacturing furniture, under the firm name of

F. W. Kreling & Sons, and also in conducting the theater, known as the Tivoli Opera House, under the firm name of Kreling Brothers. The firms owned a large amount of real and personal property, and a large amount of real property stood of record in the name of the deceased. After plaintiff was appointed administratrix, several suits were commenced against her by the defendant and John and Martin Kreling, two brothers of deceased, to determine the ownership and right of possession of various properties standing in the name of deceased and claimed as a part of his estate. While these actions were pending, and before any one of them had been tried, the parties entered into a written agreement whereby they undertook to settle and compromise all their differences. This agreement was reported to and approved by the court, and a copy thereof is attached to and made a part of the complaint and findings in this action. By the terms of the agreement the plaintiff herein, who was named as party of the second part, covenanted and agreed, among other things, to convey to the defendant, by a good and sufficient bargain and sale deed, five separate parcels of land, and to pay to defendant the sum of ten thousand dollars in gold coin. And then follows a provision in these words: "And the said property, so to be conveyed, as is hereinabove set forth, is to be chargeable only with the debts of the said firm of 'F. W. Kreling & Sons,' and the said parties of the first part, jointly and severally; excepting always the mortgage on the first piece of property hereinabove described in subdivision a; also excepting an indebtedness due to the Anglo-Californian Bank, of said city and county, in the sum of five thousand (5,000) dollars, which is evidenced by two promissory notes, payable to said Anglo-Californian Bank, in the sum of twenty-five hundred (2,500) dollars each; which said last-named notes the said F. W. Kreling and F. W. Kreling & Sons are to assume the payment of." Then follow the covenants and agreements to be performed on the part of the defendant and the parties of the first part.

The controversy in this case is in regard to the indebtedness to the Anglo-Californian Bank. Plaintiff commenced the action on September 24, 1894, and alleged in her complaint, among other things, that, in pursuance of the order of the court approving the said agreement of compromise and directing that

the same be carried into effect by the parties thereto, she did carry out all the terms and conditions of the said agreement on her part and executed the several conveyances therein mentioned, and paid over to the defendant the said sum of ten thousand dollars as required; that the defendant did not carry out the terms of the said agreement on his part in this, that at the time of the execution of the said agreement there was due to the Anglo-Californian Bank the sum of five thousand dollars, upon two promissory notes, executed by the firm of Kreling Brothers, composed of William Kreling, deceased, and by F. W. Kreling & Sons, composed of F. W. Kreling and William Kreling, which notes at said time were and are still held by said bank; that defendant individually, and as the surviving partner of F. W. Kreling & Sons, promised and agreed by said contract to assume the payment of said notes and procure a release of the said estate and herself individually from said liability to the bank thereon; that defendant failed and neglected to pay to the said bank the said money, or any part thereof, although often requested so to do by plaintiff and by the bank, and that by reason of such failure and neglect the said bank, on August 7, 1894, commenced an action against plaintiff, as administratrix, etc., and against her individually, to recover the said sum of five thousand dollars and interest, and to foreclose a mortgage upon land owned by plaintiff, which mortgage the bank claims was given by said deceased, in his lifetime, to secure payment of said sum; that after the execution by plaintiff of the various instruments in writing conveying to defendant the property in said agreement of composition agreed to be conveyed, and ever since said time, the defendant has continued to dispose of the property so conveyed, with a view, as she is informed and believes, of avoiding the payment of said sum, and to compel plaintiff to pay the same in violation of his said agreement.

Wherefore, plaintiff demanded judgment and a decree in effect compelling the defendant to specifically perform the agreement on his part by paying the claim of the said bank within ten days after the entry of the decree, and, on his failure to do so, that the said land be sold under the directions of the court to satisfy said claim, and that a commissioner be appointed by the court to carry the decree into effect.

The defendant demurred to the complaint upon the grounds that the court, as a court of equity, had no jurisdiction of the subject matter of the action; that the plaintiff had not legal capacity to sue; that there was a nonjoinder of parties defendant; and that the complaint did not state facts sufficient to constitute a cause of action.

The demurrer was overruled and the defendant then answered, setting up as a defense that the said agreement was obtained by fraud; that the plaintiff had not performed the covenants on her part; that the notes sued upon were given for the individual debt of the said deceased and were not the notes intended to be assumed; that the agreement was entered into through mistake, and praying that the same be canceled.

After a protracted trial the court found all the material facts in favor of the plaintiff, concluding as follows: "That all the allegations and averments of plaintiff's complaint are true, and all the denials and allegations of the defendant in his answer inconsistent with or contradictory to the allegations of plaintiff's complaint are untrue."

And as conclusions of law the court found that plaintiff was entitled to the specific performance of the agreement on the part of the defendant, as prayed for in her complaint, and that she had a lien upon all the property conveyed by her to the defendant, by virtue of the said agreement, to the extent of five thousand dollars, with interest thereon as provided in said notes, and that said property was subject to said lien.

A decree was accordingly entered, directing the defendant to specifically perform the agreement by paying the said notes within ten days, appointing a commissioner to sell one of the pieces of real property mentioned in the agreement, and from the proceeds to pay the said indebtedness, etc., in case the defendant failed to obey the decree.

From that decree this appeal is prosecuted by the defendant on the judgment roll, without any statement or bill of exceptions; and the only question is, Did the court err in overruling the demurrer?

It is claimed for appellant that the action was simply one for the enforcement of the specific performance of a contract, and that the facts stated and found to be true do not show such a case

as a court of equity will entertain, for the reason that the plaintiff had an adequate remedy at law, and, besides, that the contract sued upon lacked the essential elements of mutuality.

In our opinion, the action was not alone one to enforce specific performance. It also involved the foreclosure of a lien; and of such actions courts of equity always entertain jurisdiction.

By the terms of the agreement, appellant assumed the payment of the notes to the Anglo-Californian Bank, and when he did so, he, as between himself and the estate, became the principal debtor, and the estate a surety. (1 Jones on Mortgages, sec. 741; *Hopkins v. Warner*, 109 Cal. 133; *Tulare County Bank v. Madden*, 109 Cal. 312.) And respondent was authorized to bring an action to enforce the payment without first making payment herself. (1 Jones on Mortgages, sec. 769; *Abell v. Coons*, 7 Cal. 105; 16 Am. Dec. 229.)

Did the agreement create a lien which could be enforced? A lien is a charge imposed upon specific property, and it may be created by contract of the parties or by operation of law. (Civ. Code, secs. 2872, 2881.) The provision of the agreement was: "And the said property so to be conveyed, as is hereinabove set forth, is to be chargeable only with the debts, etc., excepting an indebtedness due to the Anglo-Californian Bank," etc.

This language, we think, must be construed to mean that the parties understood and agreed that the said indebtedness to the bank should be a charge or lien upon the property to be conveyed. And it was not rendered ineffectual by the fact that appellant had not yet acquired the property. "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest." (Civ. Code, sec. 2883.)

The first ground of demurrer cannot therefore be sustained.

The objection that the plaintiff had not legal capacity to sue is rested upon the theory that the complaint contained no sufficient allegation of her appointment as administratrix of the estate of William Kreling, deceased. The allegation was, that on a day named, plaintiff, "by order and decree of this court, was duly appointed administratrix of the estate of said William Krel-

ing, deceased, and on said last-named day plaintiff duly qualified as such by filing her bond," etc., "as directed by order of said court, which bond was duly approved." Conceding that this allegation was defective, because it did not state that plaintiff was appointed administratrix by order and decree of the court "duly given or made" (Code Civ. Proc., sec. 456), still the representative character of plaintiff as administratrix is several times recited in the agreement which was signed by appellant and attached to and made a part of the complaint, and in defendant's answer she is spoken of as, and, in effect admitted to be, the administratrix of the estate at least four different times. A defect in a complaint may be cured by the averments of the answer, even though a demurrer had been erroneously overruled; and we think the defect complained of here, if any such existed, had been thus cured. (*Cohen v. Knox*, 90 Cal. 266; *Shirely v. Semi-Tropic Land etc. Co.*, 99 Cal. 259; *Daggett v. Gray*, 110 Cal. 169.)

The objection that there was a nonjoinder of parties defendant cannot be sustained. The defendant was severally liable, and it was not necessary to join others, though they might also be liable. (Code Civ. Proc., sec. 383.) Besides, the demurrer does not specify who else should have been joined or in what the nonjoinder consists. But such specification was necessary. (Code Civ. Proc., sec. 431; *O'Callaghan v. Bode*, 84 Cal. 495.)

Appellant cannot complain that by the decree he is permitted to discharge his obligation by paying off the indebtedness to the bank before a sale of his property is had. In that respect he is certainly not prejudiced by the decree. Nor can he complain that the money is to be paid to the bank, and not to respondent for the use of the bank. Nor do we see how he can be heard to complain that one of the parcels of land only was specifically designated to be sold. *Non constat* but that the land ordered sold will be amply sufficient to satisfy the decree; and, if not, appellant will not be injured, for he is personally liable for the whole indebtedness.

Objection is made that the court had no authority to appoint a commissioner to sell the property, but, so far as we can discover from the record, it was justified in doing so, under the authority conferred by section 187 of the Code of Civil Procedure, and in conformity with the provisions of section 726 of the Code of Civil Procedure.

Without discussing further the questions presented, it is enough to say that in our opinion the complaint stated a cause of action and was sufficient. The demurrer was therefore properly overruled, and the judgment should be affirmed.

Haynes, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Harrison, J., Van Fleet, J., Garoutte, J.

[S. F. No. 703. Department One.—October 1, 1897.]

ERNESTINE KRELING, as Administratrix, etc., of William Kreling, Deceased, et al., Respondent, v. F. W. KRELING, Appellant.

RECEIVER—APPOINTMENT AFTER JUDGMENT—DIRECTION AS TO POSSESSION.—

Where a judgment has been rendered directing the defendant to satisfy a particular claim within a specified time, and, in default thereof, that a certain piece of real property described in the judgment be sold and the proceeds applied in payment of said claim, and, if insufficient, that judgment should be docketed against the defendant for the deficiency, the court has no jurisdiction, in an order thereafter made appointing a receiver, to direct him to take charge and possession of any property of the defendant other than that described in the judgment.

ID.—STAY OF EXECUTION—ENTRY OF JUDGMENT.—After the entry of the judgment, although there had been no appeal therefrom, and the defendant had obtained a stay of its execution until after the decision of his motion for a new trial, the court had jurisdiction to appoint a receiver of the land which it directed to be sold, and to give him authority to collect the rents thereof and to hold the same subject to its further order.

APPEAL from an order of the Superior Court of the City and County of San Francisco appointing a receiver. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Thomas A. McGowan, F. H. Smithson, J. D. Sullivan, and Herbert Choynski, for Appellant.

H. H. Lowenthal, for Respondent.

HARRISON, J.—The plaintiff seeks by this action to compel the defendant to satisfy an obligation made by her intestate to the Anglo-Californian Bank, and on November 9, 1895, the superior court rendered its judgment directing the defendant to discharge within a specified time certain indebtedness upon two promissory notes held by that bank, upon which a claim had been made by it against the estate of her intestate (and which by an agreement between her and the defendant he had agreed to assume and to release the said estate therefrom); and that in default thereof a certain piece of real property described in the judgment be sold and the proceeds applied in payment of said claim. The defendant gave notice of his intention to move for a new trial, and upon his motion the court, November 21, 1895, ordered a stay of execution until its decision upon this motion. In February, 1896, the plaintiff made an affidavit to the effect that the defendant had, during the pendency of the action, and prior to the entry of the judgment, transferred and disposed of his property and encumbered the same for the purpose of preventing the enforcement of the judgment, and asked for the appointment of a receiver, and thereafter the court appointed a receiver to take charge and possession of the land directed to be sold, and also of certain personal property described as "the furniture manufacturing business conducted under the firm name and style of F. W. Kreling & Sons, together with all the fixtures, appliances, appurtenances, tools, dues, claims, and demands of any kind and character belonging to said firm of F. W. Kreling & Sons, or in any way connected with said business, and of all the personal property used or employed in or about the said business, and the horses and wagons connected with said business, or standing in the name of F. W. Kreling, the defendant in the above-entitled action." From this order made after judgment the plaintiff has appealed.

A receiver is an officer or representative of the court, appointed to take the charge and management of property which is the subject of litigation before it, for the purpose of its preservation and ultimate disposition according to the final judgment therein. As in any particular action the court has jurisdiction over only the property which is the subject of that litigation, that is the only property which it can authorize its receiver to

interfere with or to take into its possession. The appointment of a receiver is classed in our code as one of the provisional remedies in an action, and is sometimes styled an equitable execution before judgment. If he is not appointed until after judgment has been rendered, as in the present case, his functions, either for the purpose of carrying the judgment into effect, or for its preservation until the judgment shall be executed, are limited to the property described in the judgment. By the judgment herein the defendant was directed to make a certain payment of money to the Anglo-Californian Bank, and, in default thereof, the court directed a specified piece of real estate to be sold and the proceeds thereof applied upon such payment, and that, in case of a deficiency in these proceeds, judgment therefor should be docketed against the defendant, upon which execution might issue; and, for the purpose of determining whether a receiver should be appointed, the court was authorized to accept this judgment as a correct determination of the rights of the parties. The affidavit of the plaintiff to the effect that the defendant was putting other property out of his hands, and had disposed of or encumbered his property so as to impair her ability to collect any deficiency judgment there might be, did not enlarge the scope of the judgment or authorize the court to take into its custody, through the agency of a receiver, any property not embraced in the judgment. It must be assumed that the property which the court in its judgment directed to be sold for the purpose of satisfying the obligation of the defendant was the only property which was subject to such sale, and in her affidavit for the appointment of the receiver the plaintiff states that the defendant had transferred the furniture manufacturing establishment to a corporation. To the extent, therefore, that the order appointing the receiver embraced this property, it was in excess of the jurisdiction of the court and void. (*Staples v. May*, 87 Cal. 178.)

It was within the jurisdiction of the court to appoint a receiver of the land which it directed to be sold, and to give him authority to collect the rents thereof, and to hold the same subject to its further order. Although there had been no appeal from the judgment, the defendant had obtained a stay of its execution until after the decision of his motion for a new trial. The

action was still pending in the court, and the power of the court to take the property into its custody that it might be available for the satisfaction of the judgment was not impaired by the mere entry of the judgment.

The superior court is directed to modify the order appealed from in conformity with this opinion.

Van Fleet, J., and Garoutte, J., concurred.

[S. F. No. 676. Department One.—October 1, 1897.]

Z. N. SPAULDING, Appellant, v. GEORGE E. DOW, Respondent.

WARRANTY—CONTRACT—FINDINGS—WANT OF CONSIDERATION.—In an action to recover for the breach of a written warranty of the capacity of a pump manufactured and sold by the defendant to the plaintiff, in which the defendant, by answer, denies making the representations alleged, sets out the representations that were made, and that the alleged warranty was without consideration and given after the purchase and delivery of the pump, and as a counterclaim, the amount of certain expenditures made by him in sending an agent to examine the pump, under an alleged agreement with plaintiff that, if the pump was found to be as represented by defendant, plaintiff would repay the expense of such agent, and by cross-complaint set up a want of consideration for the warranty and prayed for its reformation on account of accident and mistake, a finding that the defendant had fully complied with the terms of the contract, is sufficient to support a judgment in his favor, without finding specifically on the probative facts as to what representations and warranties were made, and rendered the subject matter of the cross-complaint immaterial.

ID.—IMMATERIAL ISSUES.—A finding that the warranty was without consideration rendered immaterial the issues raised by the cross-complaint as to its being made by accident or mistake.

ID.—COUNTERCLAIM.—A finding, in general, that the allegations of the counterclaim "are untrue, and not supported by the evidence," should not be construed as intended to contradict the specific findings upon the main subject of the controversy.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. A. A. Sanderson, Judge.

The facts are stated in the opinion of the court.

Myrick & Deering, and Samuel Knight, for Appellant.

C. E. K. Royce, R. M. Royce, and Chickering, Thomas & Gregory, for Respondent.

VAN FLEET, J.—Action for breach of an alleged warranty of the capacity of a pump manufactured and sold by defendant to plaintiff. The material averments of the complaint are that the pump was sold and delivered to plaintiff on July 18, 1887, at the city of San Francisco, with the understanding by defendant that it was for use by plaintiff as a vacuum pump in the manufacture of sugar in the Hawaiian Islands; that as an inducement to plaintiff to purchase, and before the purchase was made, defendant represented that the pump was “fully equal” to a Blake vacuum pump (of a certain designated capacity), and gave plaintiff a written warranty guaranteeing such capacity. That plaintiff, relying upon such representations and warranty, purchased and paid for the pump, had it shipped to the Hawaiian Islands, and there tried in good faith to use it for the intended purpose; but that the defendant’s representations were false; that the pump was not as represented and guaranteed, but was and is useless for the purposes for which it was purchased; that by reason of the premises plaintiff suffered damage, for which judgment is asked.

The answer sets up that the pump was constructed in pursuance of an offer or proposal theretofore made by defendant and accepted by plaintiff, wherein the dimensions and character of the pump were particularly specified, and in accordance with which the pump was built by plaintiff’s express directions and delivered to him on July 18, 1887; denies making the representations as alleged by plaintiff, and sets out the representations that were made; denies that defendant gave any written warranty prior to the purchase or in consideration thereof, but avers that the alleged written warranty was presented to him by plaintiff and signed by him long after the purchase and delivery of the pump, was without consideration, did not express the capacity of said pump, as defendant had represented it or was willing to warrant it, but that it was inadvertently signed by defendant; denies that the pump was not of the capacity as represented, but al-

leges that it was in all respects according to the contract and perfect in all particulars.

In a counterclaim defendant sought to recover the amount of certain expenditures made by him in sending an agent to examine and report upon the pump, under an alleged agreement with plaintiff that if the pump was found to be as represented by defendant, plaintiff would repay the expense of such agent, it being alleged that the result of the examination was to show that the pump was fully up to the representations of defendant.

In a cross-complaint defendant set up the circumstances of the giving of the written warranty counted on by plaintiff; alleged that the same was given after the purchase and without consideration; that it did not conform to the terms of the representations of defendant, but by accident and mistake omitted certain terms required to express the true intent of the defendant, and prayed that it be reformed.

The court found the contract for the construction of the pump to be substantially as stated by defendant in his answer; that defendant "made and completed the said pump in all respects according to said agreement," and delivered the same to plaintiff's agents on or about July 18, 1887; "that the only portion of the agreement for the purchase and sale of said pump which was reduced to writing was the written offer on the part of the defendant"; that the alleged written warranty, signed by defendant, was presented to defendant on August 10, 1887, "after the said pump had been manufactured and delivered"; and that defendant, "without any consideration therefor whatsoever signed the same; that said warranty was also inadvertently signed by defendant"; that all the representations of the defendant to plaintiff regarding said pump "were true, and that the said pump was sound and merchantable at the time and place of production and delivery, and free from any latent defect, and reasonably fit for the purposes for which it was manufactured."

It was also found that the allegations of defendant's counterclaim were untrue.

Upon these findings judgment was entered for defendant for his costs. Plaintiff appeals from the judgment upon the judgment-roll alone, making the single point that the findings do not support the judgment.

It is contended that the findings are not responsive to the issues; that they are contrary to the admissions of the pleadings; and that they are inconsistent with and contradictory of each other. We are unable to perceive wherein either or any of these objections are well founded.

Appellant urges that he was entitled to a specific finding as to what, if any, representations and warranty were made by respondent. Such a finding would have been probative in character, and it is only upon the ultimate facts that the court is required to find. The fact upon which plaintiff's right to recover depended was, Did defendant comply with the terms of his contract? The contract necessarily included whatever representations or warranties were in fact made as to the capacity of the pump, and the court, in finding that defendant had fully complied with the terms of that contract, was not required to set out what those terms were. The latter was mere matter of evidence from which the fact found was to be deduced. It is found that the pump was constructed and delivered in all respects according to the contract. This was the ultimate fact.

It is claimed that there was a failure to find upon the issues made by the cross-complaint and the answer thereto. But in this appellant is mistaken. The only material issues made by the latter pleadings were whether the alleged written warranty was supported by any consideration; and if so, whether it was signed by inadvertence or mistake, without expressing respondent's intention. The court found that the alleged writing was without consideration; and thereby the question whether its terms expressed the intention of the maker became immaterial. Moreover, the finding that the contract had been fully complied with by respondent rendered the entire subject matter of the cross-complaint immaterial to the rights of the parties.

It is said that the findings are contradictory and inconsistent, in that by its finding that the allegations of the counterclaim "are untrue, and not supported by the evidence," the court impliedly found that the pump was defective and incapable of performing the work respondent represented it would do. But the finding has not such effect. The only material question raised by the counterclaim was as to respondent's right to recover the amount of the expense there alleged; and the finding simply

negatives such right. It is general in terms, and is not to be construed as intended to contradict the specific findings made upon the main subject of the controversy.

We think the findings fully support the judgment.

Judgment affirmed.

Harrison, J., and Garoutte, J., concurred.

[S. F. No. 753. Department One.—October 1, 1897.]

In the Matter of the Estate of EUTHANASIA S. MEADE,
Deceased. PORTER SHERMAN, Appellant, v. PATIENCE
SHERMAN, Respondent.

WILL—LETTER ADDRESSED TO UNDERTAKER—DISPOSITION OF BODY—REFERENCE TO ADMINISTRATOR—LACK OF TESTAMENTARY CHARACTER.—A letter addressed to an undertaker, the main object of which was to provide for a disposition of the body of the writer in case of death, concluding with a statement that the estate of the writer must pay all expenses accruing, and that her brother will take charge of her estate, and be the sole administrator without bonds, to trade, sell, or occupy, as may seem to him fit, is not of a testamentary character, and the language of the concluding paragraph is more consistent with a construction that she was referring to a will already made, or to be made, than that she had the *animus testandi* when writing the letter.

ID.—TESTAMENTARY INTENTION MUST BE CLEARLY MANIFESTED—RIGHTS OF HEIRS.—The intention of the deceased that a paper should stand for a last will and testament must be plainly apparent, and the heirs at law are not to be disinherited unless such intention is clearly manifested, and expressed with legal certainty.

APPEAL from a judgment of the Superior Court of the County of Santa Clara. John Reynolds, Judge.

The facts are stated in the opinion of the court.

Charles Clark, for Appellant.

The nomination of the brother as administrator, without bonds, shows a testamentary intent. (2 Redfield on Wills, 59; Williams on Executions, 7th ed., 267-390; Schouler on Wills, sec. 297; *In re Hickman*, 101 Cal. 613.) No particular words are necessary to show a testamentary intent, and the giving of her brother full control of her estate shows a testamentary in-

tention of the deceased sister. (*Mitchell v. Donohoe*, 100 Cal. 202; 38 Am. St. Rep. 279; *In re Stratton*, 112 Cal. 517.) Construction should be in favor of testamentary intention. (Civ. Code, secs. 1325, 1326; *Rhoton v. Blevin*, 99 Cal. 648.)

Nicholas Bowden, for Respondent.

That the paper in question shows no testamentary intention is sustained by the decisions. (*In re Richardson*, 94 Cal. 63; *Succession of Elliott*, 27 La. Ann. 40; *Wootton v. Redd*, 12 Gratt. 196; *Hatcher v. Hatcher*, 80 Va. 169; *Smith v. Bell*, 6 Pet. 68; *McBride v. McBride*, 26 Gratt. 476; *Sutherland v. Sydnor*, 84 Va. 880.)

GAROUTTE, J.—Appellant filed a petition asking that a certain document, olographic in character, be probated as the last will and testament of Euthanasia S. Meade, deceased. A copy of the purported document accompanied the petition. Upon demurrer it was held that the document was not a will, and upon this appeal the only question presented is, Was the paper testamentary in character?

The document under consideration was in the form of a letter addressed to an undertaker residing in the city of San Jose, and dated some sixteen months prior to the death of the writer. This letter is as follows:

“San Jose, June 30, 1894.

“Mr. Woodrow, Undertaker.

“Realizing the uncertainty of this life, and the surety of coming dissolution, and wishing the cremation of this my mortal body, and also having a most absolute abhorrence of being put in the ground to decay and rot, I hereby ask and empower you to take my body to the nearest crematory and there have the same reduced to ashes at the least possible expense, with no ostentation whatever. Money thrown away in useless parade of the dead, in my opinion, might better be spent caring for the living and making them comfortable and happy.

“In disposing of me use no unkindly care, neither make long or expensive delays. I do not propose entering into detail; use some judgment, and, above all, be simple, practical, expedient.

“The only person I care to have apprised of my death is my brother, Porter Sherman, of Kansas City, Kansas, associated

with the Wyandotte First National Bank. A message sent there will reach him, and perhaps he may be in Leipsic, Germany, where of late years he and his family have spent much time.

"I intend at no distant day to write this in substance and send to your address; but in case of accident or sudden demise this may answer any purpose arising from such calamity.

"No, I have no fear of the hereafter. Oh, my Lord, teach me to live right, then in dying there is no sting.

"My estate must pay all needful expenses accruing, but nothing for show or ostentation.

"My brother, Porter Sherman, will take charge of my estate, and be the sole administrator, without bonds, to trade, sell, or occupy, as may seem to him fit.

"I am very truly,

"EUTHANASIA SHERMAN MEADE.

"June 30, 1894."

The last paragraph of the writing is the one to which especial importance is attached, as stamping the paper as of testamentary character. It is claimed that by this clause the brother of deceased, Porter Sherman, was not only appointed executor of the estate, but that a devise and bequest to him of all her property is there declared. It is further claimed that, conceding there is no disposition of her estate by the document, still there is an appointment of an executor, and that such fact, standing alone, makes the paper a will and entitled to probate. If the paper appoints an executor, this contention is sound. (*In re Hickman*, 101 Cal. 613.)

The intention of the deceased that the paper should stand for a last will and testament must be plainly apparent. The heirs at law are not to be disinherited unless such intention is clearly manifested; and, in this case, the question coming to the court upon demurrer, we are confined to the face of the paper itself for a discovery of that intention. "Effect must be given to the intention of the testator, if that can be discovered, and is consistent with the rules of law. But the intention must be expressed and with legal certainty, otherwise the title of the heirs at law must prevail." (*Sutherland v. Sydnor*, 84 Va. 880.) "It must satisfactorily appear that he intended the very paper to be

his will. Unless it so appear the paper must be rejected." (*McBride v. McBride*, 26 Gratt. 476.) "It is not for courts to declare that to be a testamentary disposition of his estate when it does not clearly appear that such was the intention of the individual executing it." (*In re Richardson*, 94 Cal. 65.) Applying the principle of law just declared, we are not satisfied that the deceased intended the document above set out to be her last will and testament. It is not clearly apparent that it was written *animo testandi*. It is plain that the main question in the deceased's mind was the disposition of her body; and that she took her pen in hand to advise the undertaker upon that matter. Such being the principal purpose of the writing, it should certainly be made plain by apt words that incidentally she also intended the paper as her last will. It is evident that the lady was possessed of intelligence and education, and it is hardly conceivable that such a one should have so indistinctly and inappropriately expressed her wishes, if the making of a will was in her mind at the time. The language of the last paragraph of the writing is more consistent with the construction that she was referring to a will already made, or one thereafter to be made. As to the words of this paragraph possessing the importance of a devise to Porter Sherman of all her estate, it is entirely too weak and indefinite. In *In re Richardson, supra*, we find in the letter there involved much stronger language; yet the court held that no devise was thereby made, and the paper was no will. In speaking of Porter Sherman as the administrator, and in speaking of his management of her estate, she wholly failed to use a word or words clearly expressing the intention contended for by appellant. It was an easy thing to do so. It was a probable thing for her to do. It is improbable that a woman like her would have used the language she used if she had intended the paper as a will.

Judgment and order affirmed.

Harrison, J., and Van Fleet, J., concurred.

Hearing in Bank denied.

[Sac. No. 146. In Bank.—October 4, 1897.]

In the Matter of MULLER & KENNEDY, in Insolvency.

INVOLUNTARY INSOLVENCY—TRANSFER OF STORE BY INSOLVENT FIRM—PREFERENCE OF CREDITOR—CONTEMPLATION OF INSOLVENCY—FRAUD—QUESTION OF FACT—PRIMA FACIE EVIDENCE—REBUTTAL—SUPPORT OF FINDINGS. Upon the trial of a petition in involuntary insolvency by creditors of an insolvent firm, charging that, within thirty days next preceding, the firm had transferred its stock in trade, and the fixtures and book accounts of its store, with intent to hinder, delay, and defraud the creditors of the firm, and also in contemplation of insolvency, where the evidence showed that the transfer was made to one creditor in payment for borrowed money, and did not exceed the debt in value, and it was testified that, at the time of the transfer, there was no intention to hinder, delay, or defraud any creditors, and that the firm and each partner, though insolvent in fact, did not contemplate insolvency, or intend to file any petition in insolvency, the question of their intent to make a fraudulent preference forbidden by the Insolvent Act, is a question of fact, and not of law; and, although the fact that the transfer was out of the usual course of business, was *prima facie* evidence of fraud, yet such *prima facie* evidence might be overcome by rebutting evidence, and where the court found against any intent to defraud, and against any contemplation of insolvency, at the time of the transfer, and refused an adjudication of insolvency under the petition, its findings and judgment cannot be disturbed upon appeal for insufficiency of the evidence.

1D.—RIGHT OF INSOLVENT DEBTOR TO PREFER CREDITORS.—Except as limited by the statute, an insolvent debtor may lawfully make preferences among his creditors, even to the extent of transferring all of his property to one creditor to the exclusion of others; and a conveyance of property which pays one creditor a just debt and nothing more, is not fraudulent *per se* against other creditors of the insolvent debtor, and can only be attacked by showing that it is in violation of the insolvent law.

APPEAL from a judgment of the Superior Court of San Joaquin County. Joseph H. Budd, Judge.

The facts are stated in the opinion.

James A. Louttit, and Joseph Kirk, for Appellants.

Gould & Bogue, for Respondents.

THE COURT.—When this case was in Department the opinion hereto attached was prepared by the commissioners, and, the justices of the Department not being able to agree as to the

proper disposition of the appeal, the case was ordered into Bank. After due consideration of the case in Bank, we are satisfied with the conclusion reached by the commissioners; and for the reasons given in their opinion the judgment is affirmed. The opinion prepared by the commissioners is as follows:

SEARLS, C.—“This is an appeal by petitioning creditors from an order of the superior court in and for the county of San Joaquin refusing an adjudication of insolvency, and from a final judgment in favor of respondents for their costs.

“The appeal was taken within sixty days after the rendition of judgment, and is supported by a bill of exceptions.

“The petition alleges two distinct acts or grounds of insolvency on the part of Muller & Kennedy, the respondents, viz: 1. A transfer of their property on the nineteenth day of July, 1895, at the city of Stockton, with intent to hinder, delay, and defraud their creditors; 2. A transfer of the same property (a stock of groceries) in contemplation of insolvency.

“Defendants answered, denying the material allegations of the petition. The court found in substance as follows: 1. That on the nineteenth day of July, 1895, respondents, as partners, made a transfer of their property, viz., a stock of groceries, provisions, and other merchandise in the business conducted by them at Stockton, to one Kate Murray; said transfer was not made to hinder or delay or defraud their creditors; 2. That at the time of such transfer said respondents were and now are insolvent, and they had not then, and have not now, sufficient property with which to satisfy the claims and demands of the petitioners in this proceeding; 3. The third is the same as the first as regards the assignment to Kate Murray, with the addition that the ‘sale, conveyance, and transfer was not made in contemplation of insolvency’; 4. The fourth is in substance the same as the second.

“Upon these facts the court drew the conclusion of law that the proceeding should be dismissed and that respondents have their costs.

“The first point made by appellants for reversal is, that the evidence is insufficient to justify the finding that the conveyance was not made with intent to hinder or delay or defraud creditors.

“The evidence bearing on this point is that given by the re-

spondents, and is in substance and effect that Muller & Kennedy were copartners in the retail grocery and provision business at Stockton. The stock in trade, fixtures, and book accounts of the firm were worth eight to nine hundred dollars, and they had no other assets; either the firm or Muller (it is not clear which) owed Kate Murray eight hundred dollars for money borrowed to pay an equal sum which had been borrowed and placed in the business. They were at the same time indebted to the petitioners here and others to the extent of seven hundred or eight hundred dollars, besides the demand due Kate Murray. A few of their bills were overdue and creditors were urging payment. Kate Murray wanted her money, and they could not pay, whereupon she was about to bring suit and attach the store. To avoid this they, on July 19, 1895, sold and conveyed to her by bill of sale the entire stock, fixtures, and book accounts of the store, also the lease of the store, in payment of her demand, and she at once took possession. Kennedy says: 'I never did intend to file a petition in insolvency on my own behalf, or on behalf of the firm of Muller & Kennedy. We did not contemplate insolvency when this bill of sale was made, nor did I intend to hinder, delay, or defraud any creditors of the firm.'

"Muller also testified that he never contemplated insolvency for himself or the firm, and never intended to file a petition in insolvency on his own behalf or that of Muller & Kennedy. Both the respondents admitted that they, as individuals and as a firm, had no property or assets except that sold to Kate Murray.

"The question of the intent of an insolvent debtor to make a fraudulent preference of a creditor, forbidden by the Insolvent Act, is a question of fact and not of law. (*Haas v. Whittier*, 97 Cal. 411; *Morgan v. Hecker*, 74 Cal. 540; *Bull v. Bray*, 89 Cal. 298; Civ. Code, sec. 3442.) That respondents made the sale of all their property is conceded. That such sale was made within thirty days next before the institution of the insolvency proceeding, and that they were in fact insolvent at the time, is abundantly established.

"Respondents were retail dealers in groceries. They sold out their entire stock in trade and store fixtures and transferred their lease in one transaction, hence such sale was 'not made in the usual and ordinary course of business,' and is *prima facie*

evidence of fraud under section 59 of 'An act for the relief of insolvent debtors, for the protection of creditors and for the punishment of fraudulent debtors.' Approved March 26, 1895. (Stats. 1895, p. 131.) The section quoted follows section 55 of the insolvent law of 1880. There is no direct evidence that Kate Murray knew or had reasonable cause to believe that her debtors, the respondents here, were insolvent, etc. This fact is not an important one here, as the proceeding is not one to annul the sale to Kate Murray, but to have the respondents declared insolvent. The crucial question is, Did the respondents transfer the property in question with intent to hinder, delay, or defraud their creditors?

"The direct testimony of Kennedy negatives any such intent, and there is no testimony contradicting him, except as it is to be inferred by the attending circumstances. The findings being in favor of respondents, the question with us on appeal is, not how we would decide upon the testimony were it before us for original action, but rather is there some testimony in support of the conclusion reached by the court below.

"There is no reason to doubt but that respondents were honestly indebted to Kate Murray in the sum of eight hundred dollars, and that the value of the property conveyed to her was not in excess of her demand. Except as limited by the statute, an insolvent debtor may lawfully make preferences among his creditors, even to the extent of transferring all his property to one creditor to the exclusion of the others.

"The right of a debtor under the rules of the common law to devote his whole estate to the satisfaction of the claims of particular creditors results, as Chief Justice Marshall declared in *Brashear v. West*, 7 Pet. 608, 614, 'from that absolute ownership which every man claims over that which is his own.'

"It is an absurdity to say that a conveyance of property which pays one creditor a just debt, and nothing more, is fraudulent as against other creditors of the common debtor. In a fair race for preference, if a creditor by diligence secures an advantage, it may be maintained; but if his purpose is not to collect the claim, but to help the debtor cover up his property, he cannot shield himself by showing that his debt was *bona fide*.' (Waite on Fraudulent Conveyances, sec. 390; *Saunderson v. Broadwell*, 82 Cal.

132; *Matter of Luce, etc.*, 83 Cal. 303; *Haas v. Whittier*, 97 Cal. 411; Bishop on Insolvent Debtors, 192, 193.)

"The foregoing remarks are indulged and the authorities referred to for the purpose of showing that the payment made by respondents to Kate Murray was not *per se* fraudulent, and can only be attacked by showing it to be in violation of the insolvent law.

"There is, then, no circumstance attending the payment in question by respondents of which the statute takes cognizance as a badge of fraud, except the fact that the sale was not 'made in the usual and ordinary course of business of the debtor,' which fact, as before stated, is *prima facie* evidence of fraud.

"The court below, with the witnesses before it, with opportunities to judge as to their credibility and character which we do not possess, was evidently of opinion that the testimony rebutted the *prima facie* case made by the statute.

"We regard the case as a close one, but do not feel justified in reversing the finding. We have examined the point made by appellant, that the finding 'that the transfer was not made in contemplation of insolvency' is unsupported by evidence, and are of opinion that the finding is less open to attack than that before considered, and our conclusion is the same as that reached upon the first point.

"We recommend that the judgment be affirmed.

"Belcher, C., and Britt, C., concurred."

Beatty, C. J., did not participate in the foregoing decision.

Rehearing denied.

Beatty, C. J., dissented from the order denying a rehearing.

[Crim. No. 314. In Bank.—October 4, 1897.]

THE PEOPLE, Respondent, v. HENRY F. YOKUM, Appellant.

CRIMINAL LAW—HOMICIDE—SELF-DEFENSE—DISPUTED CLAIM TO LAND—EVIDENCE—INTERVIEW BETWEEN CLAIMANTS—PEACEFUL INTENTION OF DECEASED—UNARMED CONDITION—HARMLESS RULING.—Upon the trial of a defendant, accused of murder, who claimed that the homicide was in necessary self-defense, where it appeared that there was a disputed claim to land between the defendant and two other men, who went to the house of defendant to see about defendant's claim to the land, and in the interview both men lost their lives, it is proper for the prosecution, in opening its case, to introduce evidence tending to show that the intentions of the deceased persons were peaceful, and that they were unarmed when they started to the interview; and even if such evidence were not admissible then, the judgment could not be reversed merely because evidence was received at the wrong time, in the absence of a showing of special injury therefrom.

1D.—DYING DECLARATIONS—PROOF OF SENSE OF IMPENDING DEATH.—It is not essential to the admissibility of a dying declaration that the person making it should have stated expressly that he was making a dying statement, or that it was made under a sense of impending death; but it is enough if that fact be made to appear in any lawful mode.

1D.—MATTER FOR DYING STATEMENT—FOLLOWING OF DECEASED BY DEFENDANT—REQUEST NOT TO SHOOT AGAIN.—It is proper subject matter for a dying statement to declare that after the fatal shot defendant followed the deceased up a hill, and the deceased begged him not to shoot him any more, and that he was dying then.

1D.—DISPUTE AS TO CHARACTER OF LAND—IMMATERIAL EVIDENCE.—Where the land in dispute was claimed as mining ground by the deceased claimants, and as agricultural land by the defendant, the merits of the controversy between them are immaterial, and it is proper to refuse to permit the defendant to show that the land had been adjudged to be agricultural by the secretary of the interior.

1D.—EXPERT EVIDENCE—COURSE OF BULLET—REMARK OF JUDGE.—Where there had been a *post mortem* examination of the body of the deceased by two physicians, who disagreed as to the direction of the bullet when it entered the body, and as to the cause of its deflection, the issue between them being material to the inquiry as to whether the shot was fired in the position testified to by the defendant, or in that stated in the dying declaration of the deceased, upon the offer of other medical expert testimony on behalf of the defendant as to the cause of the deflection, to corroborate the claim made for the defendant as to the course of the bullet, though the inquiry was material, a remark of the judge that it seemed to him the evidence was immaterial, made without intent to influence the jury, and in connection with a reasonable limitation of the number of additional expert witnesses, and with the further correct remark that the material inquiry was to show the

direction of the bullet when it entered the body, could not have had the effect to influence the jury prejudicially.

ID.—COMPETENCY OF PHYSICIAN AS EXPERT—GUNSHOT WOUNDS—DEFLECTION OF BULLET.—A physician, as such, without a showing that he has had experience with gunshot wounds, is not an expert upon that subject; and as matter of common knowledge, no one can say as an expert that a bullet cannot be deflected in the human body without striking a bone.

ID.—LETTER AS EVIDENCE—PROVINCE OF JURY—PROOF OF MEANING NOT ADMISSIBLE.—The value of a letter as evidence is to be determined by the jury, to whom the facts concerning it may be shown, but the application of the facts to the letter is to be made by the jury; and where there is no technical language requiring interpretation, it is proper for the court to refuse to permit a witness to tell the meaning of the letter.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—IMPROPER STATEMENTS CHARGING MALICE—CONVICTION OF MANSLAUGHTER—IRREGULARITY NOT PREJUDICIAL. Misconduct of the district attorney, in making improper statements tending to show malice on the part of a defendant accused of murder, though strongly to be condemned, is not a prejudicial irregularity, where the jury found that there was no malice by finding a verdict of manslaughter, as the jury could not have been influenced by such misconduct unfavorably to the defendant and may have been influenced the other way.

ID.—INSTRUCTIONS—SELF-DEFENSE—DUTY TO DESIST FROM VIOLENCE TO DISABLED ASSAILANT—DOCTRINE OF APPEARANCES—CONSTRUCTION OF CHARGE. An instruction to the effect that while a person may repel force by force in defense of person, habitation, or property against one or many who manifestly intend or endeavor, by violence or surprise, to commit a known felony on either, yet when the person assailed has rendered his assailant or assailants harmless, and incapable of doing any further injury, and is no longer in danger, he must desist from further acts of violence, and if he continues the force, and kills him or them, it is murder and not self-defense, is not subject to the objection that it omits the doctrine of appearances, where, in the preceding and following instructions the jury were repeatedly told that the danger which would justify the homicide might be real or apparent, and that the jury were not to consider whether the defendant was in actual peril, but only whether the indications were such as to induce defendant, as a reasonable man, to believe that he was in peril or danger, and that if he so believed reasonably, and fired at deceased under such belief, though it should appear that he was not armed, they should acquit the defendant; and such instructions as to apparent danger are not to be deemed inconsistent with the instruction that defendant must desist from further violence to a disabled assailant, but are to be considered as explanatory of it, and as applying to the conflict in all of its stages.

APPEAL from a judgment of the Superior Court of Butte County. John C. Gray, Judge.

The facts are stated in the opinion of the court.

H. V. Reardon, and W. H. Layson, for Appellant.

W. F. Fitzgerald, Attorney General, and C. N. Post, Deputy Attorney General, for Respondent.

TEMPLE, J.—The defendant was charged with the murder of one Albert Mason, at Butte county, on the 14th of December, 1895. He was convicted of the crime of manslaughter, and this appeal was taken from the judgment and from an order refusing a new trial. Appellant complains of certain rulings, and of some instructions.

The deceased and one Frank Ballew claimed certain land as a part of their alleged mining claim. The defendant had contracted to purchase a tract which included the same land from the Central Pacific Railroad Company.

On the morning of December 14, 1895, the defendant discovered a person chopping wood upon the land, who claimed that he was authorized so to do by Frank Ballew. Defendant replied that Frank Ballew did not own the land, but he, Yokum, did, and forbade the cutting of oak trees. Ballew and Mason were informed of this assertion of title, and went to the house of defendant to see about it. In the interview both were killed by the defendant. It is contended that the homicide was justifiable because in necessary self-defense.

The first point has reference to the admission of evidence for the prosecution in opening its case, to the effect that when Ballew and Mason started to interview defendant they were unarmed. The main contention is, that it was not admissible then. But some special injury must be shown to justify the reversal of a case merely because evidence was received at the wrong time. The defense made by the defendant, and the circumstances of the killing, afterward shown, justified the admission of the evidence. But since both lost their lives in the interview it was proper for the prosecution to introduce evidence tending to show that their intentions were peaceful.

The next contention is, that the dying statement of Albert Mason was improperly received because it was not shown that it was made under a sense of impending death. The written state-

ment does not contain an assertion to that effect, and Miss Coleman, who wrote it, testified that nothing was said in her hearing which indicated that Mason supposed he was making a dying statement. But it was not necessary that the statement should be in writing, or, whether it was or not, that it should show that it was made under a sense of impending death. It is enough if that fact be made to appear in any lawful mode. (1 Greenleaf on Evidence, 158; *People v. Ybarra*, 17 Cal. 166.)

The fact was abundantly shown in this case. Miss Nora Coleman, the young lady who wrote the statement, testified that deceased came to her mother's house wounded, and "he said that his time was short; that he did not have long to live; that a doctor could do him no good. About three-fourths of an hour afterward I wrote down some statements made by him."

Mrs. Carey testified: "I went there about 3 o'clock. I saw Albert Mason there on the bed. I went into the room. He told me then that he, Yokum, had shot him all to pieces; that he believed he was going to die, and wanted me to have the folks come in and bid him good-bye, which I did. They came in and bade him good-bye. This was just before he made the dying declaration."

Sarah Hintz and William Hooper gave similar testimony.

Objection is made to a statement of the deceased to the effect that after the fatal shot defendant followed him up the hill, and the deceased begged him not to shoot him any more, that he was dying then—on the ground that the statement was not proper matter for a dying statement. But I cannot agree with counsel in this. The subject matter of the declaration was proper within the strictest rules applicable to the subject.

There was no error in refusing to permit the defendant to show that the land in dispute had been adjudged to be agricultural by the secretary of the interior. That each party claimed the land was abundantly proven. The merits of the controversy were immaterial.

Appellant complains bitterly of a remark of the court in regard to the introduction of the testimony of medical experts. There had been a post mortem examination by Doctors Rodley and Mack. Both were witnesses at the trial. They agreed that the bullet struck Mason in the back, about two and one-half inches to

the left and opposite the junction of the second and third lumbar vertebra, that it passed through the kidneys and was deflected from its course, passing out of the body to the right of the sternum in the fifth or sixth intercostal space. They disagreed, however, as to the direction of the bullet in entering the body. Dr. Rodley thought the course of the bullet upon entering the body was slightly upward, and that had it not been deflected it would have passed out to the left of the median line. Dr. Mack said the course upon entering the body was slightly downward, and that had the course of the bullet not been deflected the exit would have been on the right side. He thought the deflection was caused by striking the fifth lumbar vertebra. The issue between the medical witnesses was material. A question was raised as to whether the rifle shot was fired when the defendant was standing upon his porch, as he testified, while the deceased was on the ground immediately in front, or after the deceased had taken flight up the trail, as stated in the dying declaration.

After the two medical witnesses who made the post mortem examination had testified, the defense called other medical witnesses and endeavored to show that the deflection could only have been caused by striking a bone. This would, of course, tend to show that Dr. Mack was right and Dr. Rodley was wrong, and would be favorable to the defendant. The judge remarked that it seemed to him that the evidence was immaterial, and he would limit them to two expert witnesses. In any view the limitation cannot be said to be unreasonable. The complaint has reference mostly to the remark. While I think the inquiry was quite material, I do not think the remark, made entirely without intent to influence the jury, could have had that effect. Especially when in the remark itself the judge pointedly and correctly stated in what the materiality of the inquiry consisted, to wit, to show the direction of the bullet when it entered the body of the deceased.

It may well be doubted if the evidence itself was competent. A physician, as such, and without a showing that he has had experience with gun-shot wounds, is not an expert upon the subject, and then it was not shown that any expert could form an opinion as to whether the bullet might not have been deflected without striking a bone. I think we may say as matter of common

knowledge that no one could say that, and such was the opinion of one of the experts, Dr. Cleaveland.

I do not find anything to criticise in the remark of the judge with reference to the letter offered by the defense. The letter was received in evidence, and its value as evidence was to be determined by the jury. There was no technical language requiring interpretation, and the court did not err in refusing to permit the witness to tell its meaning. The facts could be shown and its application made by the jury.

Appellant complains of certain conduct on the part of the district attorney at the trial which he thinks improperly prejudiced his case. The conduct of that officer in regard to the matter cannot be too strongly condemned. It is difficult to understand how anyone having any regard for fair dealing could have been guilty of such conduct. But I do not think the jury could have been influenced by it unfavorably to the defendant. The effect was probably the other way, and perhaps this may account for a verdict of manslaughter when it would seem that the evidence showed either that a murder had been committed or that the homicide was in self-defense. The statements improperly made tended to show malice upon the part of the defendant. The jury found that there was no malice by finding a verdict of manslaughter. It is not necessary to say what our decision would have been had the conviction been for murder.

The chief reliance of counsel for a reversal is doubtless upon their exceptions to instruction XX given by the court. It reads as follows: "I further instruct you that, while a person may repel force by force in defense of his person, habitation, or property against one or many who manifestly intend or endeavor, by violence or surprise, to commit a known felony on either, you must understand that when the person so assailed, or about to be assailed, has so far rendered his assailant or assailants harmless—made him or them incapable of doing any further injury—and that he is no longer in danger, he must desist from further acts of violence, and if he continues the force and kills him or them it is murder and not self-defense."

It is agreed that the rifle shot was the immediate cause of Mason's death. He had been previously wounded by a discharge from the shot-gun, and his right arm shattered. The jury, it is

contended, might believe he had been disabled by the first wound to such an extent as to relieve defendant from actual danger from any assault from him. And this instruction, it is contended, told the jury that in such event defendant was not justified in firing the rifle shot, whether he knew the fact that Mason was so disabled or not. It omits, it is said, the doctrine of appearances.

The Penal Code, sections 197 and 198, provides that a person may sometimes, when in imminent danger of receiving great bodily injury, lawfully take the life of an assailant. Section 198 has been construed as declaring that a person shall have the benefit of this defense when the circumstances are sufficient to excite the fears of a reasonable person, and the party killing has acted under the influence of such fears alone. For the purpose of enabling him to make this defense he is then deemed to be in danger.

The danger which will justify a person in repelling force by force was so defined by the trial court in this case. In several instructions preceding the twentieth the jury were told that the danger might be real or apparent, and the same thing was afterward several times repeated. In the twenty-ninth they were told the danger need not be actual, and in the thirty-second and thirty-third the court gave specific instructions applicable to the very exigency to which the twentieth is understood to apply. They are as follows: "The jury are not to consider whether or not H. F. Yokum was, when he fired on Mason, in actual peril, but only to consider whether the indications were such as to induce defendant Yokum, as a reasonable man, in believing he was in peril or danger."

"If you believe that he believed reasonably that he was in peril or danger, and that he fired at deceased Mason under such belief, though it should appear that Mason was not armed, you should acquit the defendant."

These instructions do not contradict the twentieth, but may be considered explanatory of it.

But the instructions upon the character of the danger which will justify the killing naturally apply to the conflict in all its stages, and the jury could not have understood them differently.

The judgment and order are affirmed.

McFarland, J., Harrison, J., Van Fleet, J., Garoutte, J., and Henshaw, J., concurred.

[Crim. No. 223. Department Two.—October 4, 1897.]

THE PEOPLE, Respondent, v. JAMES HOLMES et al., Appellants.

CRIMINAL LAW—HOMICIDE—INVOLUNTARY MANSLAUGHTER—INFORMAL VERDICT—USE OF WORDS "NOT A FELONY"—SURPLUSAGE—PROVINCE OF JURY.—A verdict of guilty of involuntary manslaughter, found against defendants jointly indicted and tried for murder, is rendered informal by adding thereto the words "not a felony," and persisting in their use against an instruction of the court to reconsider the verdict and strike them out; but where the jury added the further words, "as charged and laid down by the court under the head of involuntary manslaughter," and it appeared that the court in its charge used the words "acts not amounting to felony" taken from the code definition of involuntary manslaughter, and the jury further recommended the defendants "to the extreme mercy of the court in its sentence and punishment," whatever may have been their intention in using the words "not a felony," their verdict cannot be construed as intended to acquit the defendants, but should have a reasonable construction to give effect to their manifest intention to convict them of involuntary manslaughter, and those words should be rejected as surplusage, it not being within the province of the jury to determine whether involuntary manslaughter was or was not a felony, which is determined by the statute, and the general verdict of "guilty of involuntary manslaughter," should stand as the verdict of the jury.

ID.—MOTION FOR NEW TRIAL—AFFIDAVIT OF JURORS—IMPEACHING VERDICT.—Upon the hearing of a motion for new trial, the affidavits of jurors cannot be received to impeach their verdict; and the court properly refused to consider an affidavit of eight of the jurors to the effect that their verdict of "guilty of involuntary manslaughter, not a felony," was intended to find the defendants guilty of a misdemeanor only, and that the jury would not have agreed to convict the defendants of any manslaughter which was a felony.

ID.—PRESENCE OF DEFENDANTS—MINUTES OF COURT—CLERICAL ERROR—BILL OF EXCEPTIONS—APPEAL—PRESUMPTIONS AGAINST ERROR.—A clerical error in the minutes of the court in stating that "the jury, defendant and all counsel" were present at a time specified will be disregarded, where the bill of exceptions states that "defendants and respective counsel" were then present, nor can the defendants impeach the verity of the bill of exceptions, and if any of them were not present, that fact should have been made affirmatively to appear; nor is the silence of the record in failing to show that defendants were present when the verdict was rendered ground for reversal, all intendments upon appeal being in favor of the regularity of the judgment, and error will not be presumed, but the absence of the defendants, or any of them, must be made to appear affirmatively in the record.

ID.—EVIDENCE TO SUSTAIN VERDICT.—The evidence reviewed and held sufficient to warrant the jury in finding a verdict of guilty of involuntary manslaughter against the defendants.

LD.—DEATH FROM RUPTURE OF BLOOD VESSEL—HYPOTHESES—SPONTANEOUS RUPTURE—UNLAWFUL ACTS OF DEFENDANTS—INSTRUCTIONS—PROVINCE OF JURY.

It appearing that the immediate cause of the death of the deceased was the rupture of a blood vessel, and the medical testimony being such as to leave the question with the jury to decide whether the rupture was spontaneous, or was the result of the unlawful acts of the defendants, it was within the province of the jury either to adopt or reject the hypothesis of spontaneous rupture, notwithstanding instructions that if there was reasonable doubt of the cause of the death, or if they could account for it upon any other hypothesis than that of the guilt of the defendants, they must acquit the defendants; and where the jury found the origin of the rupture to be the treatment received by the deceased from the defendants, their verdict cannot be disturbed upon appeal.

ID.—CONSPIRACY OF MEMBERS OF TRADE UNION TO PREVENT WORK—USE OF VIOLENCE—JOINT LIABILITY OF CONSPIRATORS—INSTRUCTION.—

Where there was evidence sufficient to leave the question with the jury as to the nature and extent of a conspiracy of the members of a trade union, including the defendants, to prevent the deceased from working, and to assault him with violence for so doing, and tending to show that some of the defendants assaulted the deceased without provocation, and that all of the defendants aided, abetted and encouraged the assault, it is proper to instruct the jury that "a conspiracy exists when two or more persons conspire to commit an unlawful act, or to commit a lawful act by unlawful means," and that "no person has any right, by violence or unlawful means, to prevent another from exercising a lawful trade or calling, or doing any other lawful act," and that "if two or more persons conspire together to prevent another person by violence or unlawful means" from so doing, "and while engaged in carrying out such conspiracy they (the conspirators) commit a felony or some other unlawful act not amounting to a felony upon the body" of such person, "they are all liable for the acts of any one of their number done in pursuance of such conspiracy."

ID.—IMPORTANCE OF CONSPIRACY ELEMENT OF CRIME CHARGED.—Defendants jointly indicted and tried for murder are not charged with the crime of conspiracy; and the conspiracy element of the crime charged becomes important only as a means of establishing the commission of the crime charged against the defendants jointly; but, in this view, evidence is properly submitted to show a conspiracy, and instructions are properly given defining it.

ID.—RESOLUTION OF STRIKING TRADE UNION—INTERVIEW OF NONUNION MEN—CONDUCT OF MEMBERS—CONSPIRACY—QUESTIONS FOR JURY.—

Although a resolution passed by the members of a trade union, who were engaged in a strike, in reference to interviewing nonunion men, may not import an intention to commit an unlawful act, or to do a lawful act by unlawful means, yet it is competent to inquire into the subsequent conduct of such members to ascertain whether or not there was a joint intention, not disclosed by the resolution, formed at the time of its passage or subsequently to do an unlawful act, or to do a lawful act by unlawful means; and the questions how far their conduct went to establish a conspiracy, and to what extent they were involved in it, and when it was formed, if at all, and when

terminated, and whether the acts of violence proved were or were not part of an original design to force the deceased to quit work, and whether the crime alleged was committed in pursuance of the conspiracy, or was the independent act of some of the persons present, outside of and foreign to the common design, are questions exclusively for the jury.

ID.—ACTS OF DEFENDANTS AT TIME AND PLACE OF ASSAULT—TIME OF CONSPIRACY.—The acts of the defendants at the time and place of the assault may be considered by the jury, as tending to show the purpose and objects of the conspiracy in its inception; nor is it necessary that the jury should locate the conspiracy at any time prior to the coming of the defendants to the building where the assault was made; but it might have originated then and there.

ID.—INSTRUCTION CITING DECISION IN ANOTHER STATE.—The method of stating a rule in a charge to the jury as having been held in a cited decision of the highest court of another state is not to be commended, but it cannot be prejudicial where there is no error in the rule as stated, when considered as part of the whole instruction.

ID.—INSTRUCTION AS TO MURDER AND MANSLAUGHTER—CONSEQUENCES OF UNLAWFUL ACTS—VAGUE EXPRESSION NOT MISLEADING.—Where the jury has been correctly instructed by the court as to the distinction between murder and manslaughter, growing out of unlawful acts, a conclusion stating that "it follows, therefore, that if an act is unlawful, or is not as duty does not demand, and of a tendency directly dangerous to life, the destruction of life by it, however unintended, will be murder; but if the act, though dangerous, is not directly so, yet sufficient to come under the condemnation of the law, and death results from it, the homicide is manslaughter," taken as part of the whole instruction, does not enlarge the correct doctrine by making a person liable for all possible consequences; and though the expression "or is not as duty does not demand," is vague and uncertain, it could not have misled the jury.

ID.—INSTRUCTION AS TO INVOLUNTARY MANSLAUGHTER—APPLICABILITY TO CONDUCT OF DEFENDANTS—QUESTION FOR JURY.—When the charge of the court fully and correctly defined manslaughter, an extract therefrom to the effect that involuntary manslaughter was "killing in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection," is not objectionable as inapplicable to the conduct of the defendants, where their conduct was such as to make it a question for the jury whether any or all of the defendants did or did not do anything in connection with a request to the deceased to quit work, in an unlawful manner, or without due caution or circumspection, or whether force was used justifiably, or under such circumstances as to make the defendants aiders and abettors in an assault upon the deceased.

ID.—CROSS-EXAMINATION OF DEFENDANT.—A defendant offering himself as a witness may be cross-examined as to occurrences testified to in his examination in chief, where the cross-examination does not go beyond the limitations prescribed in section 1323 of the Penal Code, as construed by the decisions of this court.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Edward A. Belcher, Judge.

The affidavits of the jurors referred to in the opinion set forth that they did not wish to convict the defendants of any manslaughter which was a felony, and for that reason refused to change their verdict and to strike out the words "not a felony"; that they understood that they were convicting the defendants of something less than a felony, and their idea was to find them guilty of nothing more than a misdemeanor. Further facts are stated in the opinion.

Carroll Cook, and J. N. E. Wilson, for Appellants.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

CHIPMAN, C.—Defendants were jointly indicted and tried for the murder of one C. A. Mars in the city and county of San Francisco, on the tenth day of March, 1896. They were convicted of involuntary manslaughter, and sentenced to one year in the state penitentiary. The appeal is from the judgment and the order denying motion for new trial.

The verdict is claimed to be erroneous for: 1. Insufficiency of evidence to support it; and 2. To be either void or in effect an acquittal by reason of its form. That portion of the verdict drawn in question is as follows:

"Second. We find a verdict of 'guilty' against all the others named in the indictment, to wit, against James Holmes, William Starr, D. Dunn, Neal Collins, W. Dowling, E. G. Waltz, and Walter McCoy, and find a verdict of 'Involuntary Manslaughter,' 'Not a felony,' as charged and laid down by the court under the head of involuntary manslaughter, and pray the extreme mercy of the court in its sentence and punishment, and so say we all."

1. When the verdict was brought in, the court refused to receive it, and directed the jury to reconsider it and to strike out the words "not a felony"; the jury again returned the verdict without change, and it was duly recorded. It is now said this was error, and also that the verdict was in effect an acquittal. The

court pursued the statute closely, and there is no serious question except as to the effect of the verdict. It is certainly informal, and the words, "not a felony," if given effect, contradict the words "guilty of involuntary manslaughter," which is a felony. It is made the duty of the court, by section 1161 of the Penal Code, where there is a verdict of conviction, to explain to the jury if they have mistaken the law, and direct a reconsideration of the verdict, and if the same verdict is returned it must be entered; but the court cannot require a reconsideration if it is a verdict of acquittal. The verdict clearly shows an intention to convict, and the grade of the offense is fixed by declaring it to be involuntary manslaughter. We cannot say what the jury meant by interpolating the words "not a felony," unless it be that they referred to the words "acts not amounting to a felony," which, when committed, constitute one form of involuntary manslaughter. These words were used in the instruction and were taken from the code definition. But whatever may have been the intention of the jury, by no possible construction could we reach the conclusion that the jury meant to acquit the defendants, for they not only found them guilty in terms, but recommended them "to the extreme mercy of the court in its sentence and punishment." Whether the crime of which the defendants were found guilty was or was not a felony did not lie with the jury to declare—the statute does this. There is no good reason why the verdict of a jury should not have a reasonable construction and be given effect according to its manifest intention. The words "not a felony" should be rejected as surplusage, and the general verdict of "guilty of involuntary manslaughter" should stand as the verdict.

An affidavit purporting to be signed by eight of the jurymen was read in explanation of the verdict, upon the hearing of the motion for a new trial. The court refused to consider this affidavit, to which defendants excepted. The court regarded the affidavit properly, I think, as an attempted impeachment of the verdict, which it is well settled cannot thus be done.

2. Appellants claim that the record fails to show that the defendants were present at all the stages of the proceedings against them, and the verdict is therefore void. (Citing Pen. Code, sec. 1043; *People v. Kohler*, 5 Cal. 72; *People v. Higgins*, 59 Cal. 357.)

The minutes contain the following entry for May 27, 1896: "The jury, defendant, and all counsel present." In the bill of exceptions is found the following statement: "May 27, 1896, 10 o'clock, A. M., . . . jury called and all answered present. Defendants and respective counsel present." The minute entry was doubtless a clerical error. There is nothing in the record to show what the fact was as to the defendants being all present on that day. The bill of exceptions was presented by the defendants and allowed by the court, and defendants' motion for new trial is based upon it. We do not think the defendants can now call in question the verity of their own bill of exceptions. Error must affirmatively appear. At most, the minute entry and the bill of exceptions are in conflict as to a fact. If the fact was that the defendants were not all present, they should have made the fact clearly to appear. (*People v. Bealoba*, 17 Cal. 389.) It is further claimed that the record fails to show that the defendants were present when the verdict was rendered, as required by section 1148 of the Penal Code. The minute entry is silent on the subject. If the fact is that defendants were absent when the verdict was rendered, it should have been made to appear affirmatively in the record. Error will not be presumed. On appeal all intendments are in favor of the regularity of action of the trial court. (*People v. Douglass*, 100 Cal. 1.)

3. The evidence tended to establish the following facts: On March 10, 1896, deceased, who was a lather, with his two sons—one a young lad—was working in the third story of the Shirley building, then being constructed on the corner of Fifth and Welch streets, San Francisco. About 10 o'clock of that morning, Waltz, one of the defendants, and Perkins, an indicted defendant who was not arrested, came to this building where deceased and his sons were working. The conversation between Perkins and deceased was not admitted, but that between Waltz and deceased was admitted, with the promise to show its connection with the other defendants on trial. The witness Mars, son of deceased, testified as follows: "Mr. Waltz told my father to quit; my father said he would not quit; both of them chipped in and said, Why are you not going to quit? We said, we are not members of the union, and we are not going to stick out.

We stuck out a week, and we are not members, and we are not going to stick out any longer." Something was said about the price of a day's labor, and the witness was asked to give any further conversation. He continued: "My father said he didn't care what he was getting, he would take the job; he had no standard price; he wouldn't stick out; and Perkins asked him in my presence if he would be willing to pay three dollars a day; that is what the union journeymen was striking for, for eighteen bunches of laths. . . . He said he was willing to pay three dollars a day for eighteen bunches of laths—eighteen hundred laths for a day's work. They said if he would come down and join the union he would get all the union men he wanted, and he said he would not, and they went away. They returned about three or four that day with forty men—fully forty men." He then named several of the persons as present at this last time, among them the appellants. It was admitted that they were all members of the Lathers' Protective Union. It appeared that the members of the union were on a strike on this day, and had been for ten days previously; that deceased had intended going to work the day before, and went with his sons in the morning to the building "and found four or five of the members of the union down there waiting" for them to come. Witness mentioned two of the defendants among those present at that time. They asked deceased if he and his sons intended going to work, and also if he was going to employ one Haley, to which deceased replied in the affirmative. "They [the union members] went up by the corner of Bryant street, about a quarter of a block away, and stayed waiting there around the hydrant, and Mr. Watson [the contractor] came to the job." Watson and deceased had some conversation which witness did not hear, and he was not permitted to give what his father said about it. He continued: "We came back, and we didn't start the job that morning under something he had in his mind." That evening of March 9th, the day before the alleged homicide, the union had a meeting, at which the following resolution was passed: "Moved and carried that all members who will not work to-morrow meet at Sixth and Market to-morrow morning at 8 o'clock, and appoint a committee to interview all nonunion men. Charge made by Mr. Starr against Mr. Cahill, Trade Brothers and McCluskey,

for violating the rules, referred to the executive committee." It does not appear at what time or place the union men met on the 10th before going to the place where deceased was at work. It does appear, however, that they went in large numbers. One of the defendants, Dunn, was called as a witness for the defense. In his cross-examination and in reply to the question, "Why did you go there in such numbers?" he said: "Well, I don't know why. The men that went there that day, they were men that were not working." Being again asked the question, he replied: "We were all acquainted with him, and each one had a little influence with him to persuade him to quit. We were all acquainted with him, and some of them might have more influence than the others to persuade him to quit; and they all used the same endeavor and talked to him, although I didn't speak to him at all." He was asked if they had any conversation among themselves before going as to what was to be done when they got there, and replied: "Well, no strict understanding; the intention was to go there and talk to him and show him, try to show him, where he was doing us all an injury and an injury to himself by working cheap."

When the defendants and their union friends came to the building, deceased and his two sons and one Mike Haley were working in the third story of the building, deceased and one son on a scaffolding in a hall bedroom; the party came up a narrow stairway not wide enough for two side by side; Haley was working in the back parlor adjoining the hall bedroom; the Mars boy was carrying laths; the lower part of the walls of the rooms was not yet lathed and was open between the studding, except part of the back parlor walls, admitting the passage of a person. The witness Mars testified: "The others crowded in the rear parlor, and still there was a big crowd in the hallway. A man here by the name of Haley, right in this partition under me, stepped up and says: 'Don't you think you fellows have done enough to-day?' I didn't answer him at all; and a man by the name of McCoy [one of the defendants], his head was in this room [showing]. His body was in that room, and his head in that [showing], with his head kind of through the partition, where it was open on the bottom. After Haley said:

'Don't you think you have done enough?' he [McCoy] said: 'Yes, we don't want no scab work.' My father turned around on the stage and said he was not a scab, and was not doing scab work, and at this Haley spoke and said: 'You said enough'; and I told my father to say nothing more and don't provoke the crowd. They told us to come off the stage; three or four of them said: 'Come down anyway,' and we came down. As I was coming off the stage here [showing] this man Waltz [one of the defendants], was standing about here [showing]. He still repeated the order to come down from the stage. I was on the floor at the time. My father was in the act of coming down off the stage. My father walked from the stage to where Waltz was standing, and asked him what he had to do about it; Waltz didn't say anything; my father walked past him to go into the parlor where his clothes were, and I was going to come up here by the hall here [showing]; my clothes were there. This man, Neal Collins [a defendant], while I was walking over to go through the crowd, he spoke to me; he says: 'Get your father out of here; get yourself and father out of here; they nearly killed Trade on Post street'; I was dumbfounded; I didn't know Trade went to work. I turned to my father to get him down the stairway. By that time the defendant got himself in this hallway, between my father and myself; McCoy was in here [showing]. I could see in the parlor, Haley was here [showing]. Dunn, as I turned to see him—as I turned to get my father downstairs, I saw Dunn with my eyes hit my father on the back of his head, on the right side, on the back of his head, with his fist. My arm kind of went into that room like something had hold of it; I saw McCoy have hold of his hatchet that way [showing], and he [his father] kind of locked himself in this little partition that runs out, his knee and other arm to save himself from going in the room. Dunn had already hit him. Haley had his arm drawn back—he struck in the direction of his face. McCoy had hold of his arm, trying to get him in that room; I tried to make him break the hold, to get where my father was, and a couple of men caught me around the neck, and I went down on the floor hallway. . . . Some fellow hit me when I was down; I got up again, and as I got up I heard a man, a witness in this case, who was in the parlor, saying, 'Don't

strike the old man Mars any more.' That was Billy Dasha. When they said that the crowd came out, and as they passed me to go down the stairway one fellow hit me here [showing], and poked me here [showing]; I was struggling in the crowd; my father was still in the room with Dasha. After they succeeded in going down, all of them, I turned to my father, who was very excited at the time, and showed a mark on his nose here [showing], with a little blood on it, and I told him to go up home right away, and we would see what we could do. . . . They went away in a rush, . . . down the stairway—the whole crowd. Q. Where was your brother? A. In the hallway with me, . . . they jumped on him as on me. . . . Mike Haley said, 'Look out, or you son of a B., don't hit him,' so they went by and left him alone. Father and I went down the stairway I was in a pretty bunged-up condition, and I couldn't work any more; he came down with my brother and Mike Haley to go home. He was very pale, I could see. He had no marks only this one over his eye, and a lump on the back of his head. . . . We went home. . . . He went upstairs and laid down on his bed in his room for about an hour, then came down; supper was ready at that time, and we tried to get him something to eat; he wouldn't eat; he took a little drink of tea and went right back to bed and complained very much of his head, that he had a bad headache." . . . The witness was asked what his mother did, and answered: "She put wet cloths on his head, as wet as she could get them with ice, and it didn't seem to do him any good. . . . About 12 o'clock he got to breathing very hard. . . . We tried to wake him up; he didn't know us; he laid there unconscious. . . . He was sick nine days, that is, he was unconscious, until about 4 o'clock of the morning of the 12th he came back to consciousness. He lingered without leaving his bed till the 19th, when he died." As to what occurred at the building where deceased was at work, there is considerable corroborating testimony given by Haley, the boy Mars, and by John Knapp, the watchman. The witness Mars, on cross-examination, when asked if he and his father stopped work voluntarily, said: "I stopped work because the committee told me to. We didn't get down because we wanted to. I was in fear that

the stage would come down from under us if we didn't get down. I thought if we provoked these men to anger they would turn on us and give it to us." He was asked on cross-examination if he saw anybody besides Dunn strike his father, to which he replied: "I saw a man by the name of Haley deliver a blow in the direction of my father, and must have hit him." "Q. Who were beating the old man? A. These men that I had arrested. Q. All these men? A. They were around in the crowd where he was. Q. Who was it had your father down, beating him? A. These men here that were in the crowd around my father. Q. What men? A. The seven there. Q. You leave out McRae? A. I do; yes. Q. How many men were around you beating you all this time that you saw these men beating your father? A. About twenty of them. Q. Didn't you have all you could do to defend yourself? A. I didn't try to defend myself. I was trying to get where my father was."

It is claimed that the evidence failed to show that the death of the deceased was caused by any acts of defendants. The autopsy physician to the coroner, Dr. Barrett, testified that "death was caused by intra-dural hemorrhage—that is, hemorrhage inside the membrane surrounding the brain. The hemorrhage came from the middle artery, that we call the meningeal median artery." He also testified as to an atheromatous condition of deceased's system—a limy deposit in the membranes of the arteries—which interfered with their functions. As to the cause of the rupture, he testified that "it could be occasioned by an injury, or it might be spontaneous in origin." He further testified that it might have been caused by a blow or a fall—a blow on the right side of the head might have caused it, and could have been produced in a perfectly healthy person; and that excitement resulting from physical injuries might occasion the condition. C. F. Mars, son of deceased, testified: "I saw Dunn, with my eyes, hit my father on the back of his head with his fist." The witness Knapp, watchman of the building, testified that shortly after the defendant left he noticed a small lump on the "right side of deceased's head, back of his head, above the ear." This was also noticed by Thomas F. Mars, son of deceased, immediately after the affray; also by police officer Hurley, and also by the wife of deceased when he came home.

As to what in fact was the immediate cause of the death of deceased—the rupture of a blood vessel—the evidence was not conflicting. The medical testimony, however, clearly left the question with the jury to decide whether the rupture was spontaneous and wholly dissociated from the occurrence of the 10th of March, or was caused by what the defendants did and said and their conduct toward the deceased on that day at the building where deceased was working. The jurors must have found the origin of the rupture to be the treatment the deceased received at the hands of defendants, and we cannot say they erred in reaching that conclusion.

Defendants claim that, if the death of deceased could be accounted for upon any hypothesis other than that of guilt, it was error for the jury not to do so under the instructions given; and that the hypothesis of spontaneous rupture of the blood vessel was presented by the evidence and ought to have been accepted by the jury. The court charged the jury as follows: "1. Before you can find any of these defendants guilty of the crime charged, you must be satisfied beyond all reasonable doubt that the deceased came to his death by some act of violence committed upon him by these defendants, or some of them; 2. If you can account for the death of C. A. Mars upon any other hypothesis than that of the guilt of the defendants, or any of them, you must do so, and acquit the defendants; 3. If you are not satisfied beyond all reasonable doubt as to the cause of the death of C. A. Mars, you must acquit the defendants."

It was within the province of the jury under this instruction to adopt the hypothesis of spontaneous rupture, but the jury were not bound to do so. The question was before them, under the evidence, whether the deceased came to his death through causes occasioned by defendants. This instruction, taken as a whole, did not say to the jury that they might or must adopt any possible theory as to the cause of death, and it would not have been good law if it had.

4. It is further claimed that the evidence is entirely wanting to show a conspiracy within the meaning of the law, and that the instructions of the court in relation thereto, and the liability of all the defendants for the act of any one defendant, were

erroneous, as was also the instruction as to their responsibility as aiders and abettors. The instruction was as follows: "A conspiracy exists when two or more persons conspire to commit an unlawful act or to commit a lawful act by unlawful means. No person has any right, by violence or unlawful means, to prevent another from exercising a lawful trade or calling, or from doing any other lawful act; and if two or more persons conspire together to prevent another person, by violence or unlawful means, from exercising a lawful trade or calling, or doing any other lawful act, and, while engaged in carrying out such conspiracy, they (the conspirators) commit a felony, or some other unlawful act not amounting to a felony, upon the body of the person whom they are so, by violence or unlawful means, striving to prevent from exercising a lawful trade or calling or doing any lawful act, they are all liable for the acts of any one of their number done in pursuance of such conspiracy."

It is contended that there was nothing wrong or unlawful in the action taken by the Lathers' Union on March 9th, the day before the offense is alleged to have been committed; that there was no agreement to commit any battery upon the deceased, or do him any violence; that defendants were doing no unlawful act in asking deceased to quit work the next day when they went in large numbers to the building where he was working; that the conduct of some of the defendants at that time cannot be said to be the ordinary and probable effect of the original intention of all the defendants, and it was error to instruct the jury that all the defendants could be convicted of manslaughter as abettors or conspirators, as it is alleged the court did by this instruction. The defendants are not charged with the crime of conspiracy. The conspiracy element of the crime charged becomes important only as a means of establishing the commission of the crime charged; it is in this view evidence was submitted to show a conspiracy and instructions were given defining it. Conceding that the formal resolution passed by the Lathers' Union, on its face, neither in terms nor by necessary implication, conveyed any intention to commit an unlawful act nor to commit a lawful act by unlawful means, it was still competent to inquire into the subsequent conduct of the members of the

union to ascertain whether or not there was a joint intention, not disclosed by the resolution formed at its passage or subsequently, to do an unlawful act or to do a lawful act by unlawful means. It would rarely, if ever, happen that an association, such as the Lathers' Union, would openly and avowedly enter upon a criminal conspiracy and record the purpose upon its minutes. How far the subsequent conduct of defendants went to establish a conspiracy and to what extent they were involved in it, whether that conspiracy had its origin at the meeting of the Lathers' Union, or later, or at all; whether the crime alleged was committed in pursuance of the conspiracy found to have been formed, or was the act of some of the persons present done "as a fresh and independent product of the mind of some of them, and outside of and foreign to the common design," were questions exclusively with the jury. We cannot agree with counsel for defendants that the "evidence was entirely wanting to show a conspiracy." Two of the defendants with three other members of the union went to the building early on the morning of the 9th of March, where the deceased was intending to go to work "to start the job," and "stood there waiting for deceased to come"; they asked him if he intended to go to work, and if he intended to employ one Haley, to which he said he was; they went away a short distance and remained in sight talking together; the contractor came up, and, after some consultation with deceased, the job was not started that morning. That evening the Lathers' Union passed the resolution already quoted. On the morning of the 10th, deceased and his two sons and Haley went to work; between 9 and 10 o'clock three of the defendants, Waltz, Perkins (who was not arrested), and McRae, came to the building. Waltz told the deceased to quit, and the conversation ensued already given; they went away, and in the afternoon, about 3 or 4 o'clock, they came back, together with the other defendants and thirty or forty of the union members, when the occurrences took place briefly shown by the evidence of C. F. Mars, *supra*. There was evidence tending to show that some of the defendants assaulted the deceased without provocation; that all the defendants aided and abetted and encouraged the assault; that some of the party of union members present

assaulted the sons of deceased without provocation; that the conduct of the party was such as to encourage, rather than discourage, the acts of violence resorted to; that the crowd behaved in a boisterous and turbulent and menacing manner; that when deceased and his son came down from the scaffolding they were forcibly disarmed of their hatchets, for which no apparent necessity was shown, further than by the statement of the only defendant (Dunn) who testified, and he fails to show any justification for the forcible taking away of these implements of labor from deceased and his son. The affray described by this defendant shows that many of the crowd took part in the rough treatment given deceased and his sons, and does not show that it was in any degree made necessary by anything done on the part of the deceased and his sons. They had, in fact, stopped work, and from what appeared by the evidence the alleged object of the resolution of the union was accomplished. The assault came afterward and under circumstances such as the jury might well find was wholly unprovoked and was part of the original design. Whatever of mitigation or excuse might appear from the evidence of Dunn, the most that can be said of it is, that it raised a conflict as to some portions of the evidence of the prosecution, which, under the settled rules of this court, cannot be reviewed. We think, also, that there was evidence sufficient to leave the question with the jury as to the nature and extent of the conspiracy claimed by the prosecution, and as to the guilt or innocence of the defendants in carrying it out.

It is earnestly contended that there is no evidence that there was a conspiracy to use any violence or unlawful means in getting the deceased to quit work, nor any violence used in pursuance of any agreement; that the only agreement shown was to go to deceased and ask him to quit work, and that he complied with their request, and that anything occurring thereafter was an independent act and had nothing to do with the common design; that whatever conspiracy there existed was at an end, and that defendants were no more responsible thereafter than they would be bound by statements of any coconspirator after the termination of the conspiracy. (Citing *People v. Oldham*, 111 Cal. 652; *Snowden v. State*, 7 Baxt. 482.) The rule is well

settled, as stated in *People v. Oldham, supra*, that after the conspiracy is terminated, and the crime has been committed, the admissions of coconspirators are not admissible against others, but the facts and circumstances here raised a question for the jury to decide as to when the conspiracy, if any there was, terminated, and whether the acts of violence proven were not a part of a design to force the deceased to quit work. Some of the defendants had the day before made the request; on the morning of March 10th some of the defendants again requested deceased to quit work, but he refused. When they came a third time and accompanied by a large force of men, and the assault was made as soon as deceased came down off the scaffolding within reach, it was for the jury to say whether this violence was not a part of the original design.

It is also urged that the court incorrectly instructed the jury in the instruction referred to wherein the court stated the law as laid down in *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342, and that, after stating the New York rule on the subject, it failed to state whether it was the law in this state. I think the jury must have accepted the statement as the law here, and, if they did not, no injury could have arisen of which defendants could complain; it would only be in the event that it was bad law, and was followed, that harm could have followed. This method of instructing a jury is not to be commended, but we cannot say it was prejudicial to defendants. The first part of the instruction, already quoted, correctly stated the law, and I cannot discover error in the portion taken from the New York case when considered as part of the whole instruction. The defendants overlook the fact that their acts at the time and place of the assault might properly be considered by the jury as tending to show the purpose and objects of the conspiracy in its inception.

Furthermore, under our statutory definition of conspiracy, I do not think it was essential that the jury should locate the conspiracy at the Lathers' Union meeting, or any other particular time prior to the coming of the defendants to the building; it might have been consummated then and there. If the original agreement was to make a peaceable demand upon the deceased.

to quit work, it might have been changed after some of the defendants had called on that morning and were told that deceased intended to go on with his job; it might have been changed upon the arrival of the crowd in the building. The code fixes no time at which the conspiracy must be entered into. Section 182 of the Penal Code defines conspiracy as follows: "If two or more persons conspire: 1. To commit any crime." Section 15 defines a crime or public offense to be "an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed upon conviction either of the following punishments: death, imprisonment, fine." By section 16 crimes are divided into felonies and misdemeanors. There were involved in the conduct of defendants, if found guilty, both felony and misdemeanor, and it was with the jury to say which of these, and whether the result of a conspiracy or not, and when that conspiracy, if there was a conspiracy, began.

5. The trial court gave an instruction of which the following is the concluding paragraph: "It follows, therefore, if an act is unlawful or is not as duty does not demand, and of a tendency directly dangerous to life, the destruction of life by it, however unintended, will be murder. But if the act, though dangerous, is not directly so, yet sufficient to come under the condemnation of the law, and death unintended results from it, the homicide is manslaughter." The objection made to this portion of the instruction is, that it enlarges the correct doctrine by making a person liable for all possible consequences of his act, and is directly contrary to the rule laid down in *People v. Munn*, 65 Cal. 211. In that case the blow was struck upon the head with the fist, under circumstances showing no intention to kill. The person assaulted died from the rupture of an artery inside the skull.

The court instructed the jury that "the law presumes that the natural and even possible consequences were intended by the author of the act. If of sound mind, the natural and proximate consequences. And if the act intended was unlawful, even the possible consequences. So if the act produces harm not intended, it holds him responsible for all the consequences." This was held to be error. The instruction there ignored all distinc-

tion between the intent in committing an act amounting only to a misdemeanor and one amounting to a felony. The part of the instruction before us was preceded by a correct statement of the rule of law in such case as this, as stated by Mr. Bishop, and, taking the whole instruction together, we cannot say that it enlarges the correct doctrine by making a person liable for all possible consequences. The words "or is not as duty does not demand" convey a vague and uncertain meaning, if any at all; but I cannot see that they could have misled the jury.

6. The objection is made that the court instructed the jury that involuntary manslaughter was killing "in the commission of a lawful act, which might produce death, in an unlawful manner or without due caution and circumspection." This is but an extract of an instruction which fully, and we think correctly, defined manslaughter. Whether the defendants peaceably requested the deceased to quit work, as is claimed, and did nothing in that behalf in an unlawful manner or without due caution and circumspection; and whether the deceased after he had quit work so conducted himself as to justify some of the defendants in taking away his hatchet; and, whether the blows struck by some of the defendants after deceased quit work, was all done under circumstances such as to make all the defendants aiders and abettors, was for the jury to decide. This court cannot undertake to judge of the effect of isolated acts of one or more of the defendants and say that the jury erred in holding all the defendants responsible for the consequences flowing from them.

7. It is urged that the court erred in overruling the objection of defendants to certain questions put to the defendant Dunn on cross-examination. He testified in his direct examination quite fully as to the occurrences at the building when the deceased received the alleged injury. I do not think the cross-examination went beyond the limitations prescribed in section 1323 of the Penal Code, as construed by numerous decisions of this court, and find no error here.

The case has had careful consideration, and, as we find no error, it is recommended that the judgment be affirmed.

Haynes, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 990. Department Two.—October 4, 1897.]

In the Matter of the Estate of ELIJAH E. SMITH, Deceased.

ESTATES OF DECEASED PERSONS—CARE OF VINEYARD—ACCOUNTING.—Expenses necessarily incurred by an executor in preserving a vineyard forming part of the testator's estate, and preventing the vines from being destroyed, are proper charges against the estate, for which he should be given credit in his accounting. And the presumption is that in making them the executor acted in good faith, in the absence of proof that he knew he could have caused the vineyard to be preserved at less expense.

ID.—LIABILITY OF EXECUTOR—SPECULATIVE VENTURE.—The rule as to an executor's liability for the unlawful employment of the funds of the estate is not that he is to be charged for all money invested in the speculation, and also with all that is received from it, but only that he must make good the loss resulting from the business, or if a profit has been earned that he must account for it to the estate.

ID.—CREDIT FOR PROPER EXPENDITURES.—Upon an accounting by an executor he should be given credit for expenses of administration properly made by him; and the court cannot properly reserve the question of the propriety of such disbursements for a future occasion, and charge the executor with the amount so expended as being money in hand, and direct him to apply the same to the payment of a family allowance.

ID.—CONSENT OF COURT.—The failure of an executor to obtain the consent of the court to the expenditure of the money of the estate to a particular purpose does not render such expenditure improper.

APPEAL from an order of the Superior Court of the City and County of San Francisco settling the account of an executor.
J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Chickering, Thomas & Gregory, and Gerstle & Sloss, for Appellant.

Timothy J. Lyons, and E. D. Sawyer, for Respondent.

TEMPLE, J.—This is an appeal by the executor from a decree settling the executor's third account and directing him to

pay a certain family allowance. The decedent died testate October 17, 1892, having named Leon Sloss executor. Sloss qualified as executor November 16, 1892.

The testator left a vineyard in Fresno county of one hundred and twenty-five acres. The vines were four years old. The executor took possession and during the ensuing year—1893—expended in pruning, plowing, cultivating, and irrigating it \$4858.84.

During the year 1894 he expended for the same purposes \$757.91, and in connection with the sale of raisins from the vineyard, for drayage, etc., \$483.17. In his account for that year he charged the estate \$242 for interest on moneys advanced by him.

In the year 1895 he expended for like purposes the sum of \$168.50, making a total, including the charges for interest, \$6,268.07.

May 31, 1894, an allowance was made to the widow of deceased of \$150 per month from the death of decedent. At that time the executor had already expended \$6,059.27 in caring for the vineyard.

In January, 1896, the widow caused the executor to be cited to show cause why he should not pay out of the funds in his hands the accrued allowance. The executor had a few days previously filed his third annual account, which he designated his final account, and asked leave to resign his trust. To the citation he answered that he had no funds with which to pay the allowance, and the matter of the petition and the account were heard together.

The executor has received from the vineyard for the raisins \$2,246.78, and as rent \$1,000.

The court found that no more was spent on the vineyard than was necessary for pruning, plowing, cultivating, and irrigating the same; "that a vineyard in Fresno county requires irrigation every year; that it is necessary for the preservation of the vines that they should be pruned and the land plowed, cultivated, and irrigated every year. Should they not be pruned and the land plowed, cultivated, and irrigated every year, the minimum damage would be that the vineyard would be set back three years,

and the maximum damage under these conditions would be that the vines might die altogether."

The court further found that none of the expenditures were an expense of the administration or a charge against the estate, "but the matter of said items and of the said advances may without prejudice be left for a final accounting in the matter of said estate, at which time all the circumstances proper to be considered may more properly arise, and particularly the question of loss or benefit to the estate."

In the decision it was adjudged: "That said amended third (also styled final) account be and it is settled and allowed as follows, viz: That the said executor, Leon Sloss, is chargeable, and is hereby charged, with a balance of moneys in his hands of five thousand eight hundred and forty-eight dollars and 90-100 (\$5,848.90), as of November 7, 1895, and with the real property and premises in the inventory and appraisal on file herein; and that the following items of said amended third account be and are rejected and stricken out, namely: 'November 6. Balance due Leon Sloss for advances, \$661.52'; and 'January 1. Balance due Leon Sloss for advances and expenses of administration, as per second annual account, \$4,100.91.' Provided, however, that as to the items referred to in said decision as vineyard items, the same may be presented by the executor, at his option, for the future consideration of the court upon the final settlement herein, or at such future time as may be deemed proper or expedient."

If the expenditures upon the vineyard were properly made, the executor had no money in his hands belonging to the estate. The court also charged the executor with the sum of \$3,246.78 received from the vineyard. The same decree directed the executor to pay to the widow out of the money so found in his hands the sum of \$5,575, the amount of the family allowance which had then accrued.

The parties have stipulated that the evidence is as indicated by the findings, the appellant only reserving the right to claim that certain findings of fact are conclusions of law. Possibly this stipulation does not do justice to the probate court. Our decision, however, must rest upon this basis.

Upon this evidence there can be no doubt that the court erred

in refusing to give the executor credit for the money received from the vineyard. It is quite manifest that nothing would have been realized either from the sale of raisins or rents for the year 1895 if the vineyard had not been kept up. It is suggested that it does not appear that this vineyard might not have been rented and kept up without expense to the estate. It being admitted that the expenditures were necessary to prevent the vines from being destroyed, the presumption is that the executor has acted in good faith, unless proof was made that he knew he could have caused the vineyard to be preserved at less expense.

The primary purposes and reason for administration of an estate are: 1. To preserve the estate until distribution can be made; and 2. To pay the debts of decedent. In *In re Moore*, 57 Cal. 437, the court stated the different objects to which the assets of an estate may be applied. In that view the statement is accurate. It was not an attempt to state why an administration is necessary. It would be absurd to say that the object of administration is to pay the expense of administration, nor did the court intend to say so. All other matters are incidental, and made proper because of administration, the necessity for which is as I have stated.

The expenses of administration must, in the nature of things, have priority in the order of payment. The executor cannot be compelled to pay them from his personal assets, but may apply the money in his hands belonging to the estate to that purpose. The will is not in the record, and there is nothing to show that there are any special funds in the estate. All are subject to the payment of expenses. The sources from which they have been derived are immaterial. Even if the expenditures were unauthorized, and the court should find that the money expended in the preservation of the vineyard was an unlawful use of the funds, the executor would be entitled to credit for the money received from the vineyard. The rule as to the unlawful employment of the funds of the estate is quite simple. The estate is to suffer no loss, and the executor is to make no gain. This does not mean that the executor is to be charged for all money invested in the speculation, and also with all that is received from it, but only that he must make good the loss resulting from the business, or if

a profit has been earned that he must account for it to the estate. The failure to give the executor this credit was, no doubt, an inadvertence.

And I think it was improper to order the executor to pay the allowance, reserving the question as to the propriety of the disbursements. If the money was expended properly for the preservation of the property of the estate, the order in effect required the executor to advance the money from his own funds. The court has no power or right to declare, if the money was so expended, that the executor has money in his hands as executor. If the expenditure was necessary, it was the duty of the executor to apply the funds in his hands as executor to that end, and, having so done, he cannot still have the money.

It is the duty of the executor, without special direction of the court, to preserve the property of the estate, and he does not require leave of the court so to do, and it is a question how far an order so obtained will protect an administrator either in doing or in omitting to do something which might be deemed important. When the court is so consulted the heirs are not specially cited, but on the settlement of the accounts of an executor they are called in and have a right to question the acts of the executor and to have an appeal to this court upon any determination which may be made. The previous consent to the acts of the executor cannot limit their inquiry as to the lawfulness of the acts done or the duty of the executor to do that which has been omitted. Ordinarily, it would determine the question of good faith, and quite often that is the only matter in issue. Hence, it is always an advantage to have such permission. Still, the failure to obtain it does not render the expenditures made improper. The only result is, that the matter is yet to be passed upon.

The question as to whether the expenditures made were necessary has not yet been determined by the probate judge, and we are not called upon to decide the question now. He might find that they were not necessary, or that manifestly the property was not worth the cost of preservation, and that the executor did not act in good faith in the matter. Had the vineyard been but one year old, for instance, a very different question would have been presented. So I think it an important matter that the estate was not fully administered within the year. The will is not be-

fore us. If it made it necessary to protract the administration for a number of years the problem would be quite different. Ordinarily, an administrator should not manage either a vineyard or a farm at the risk of the estate. When the estate is settled, as it should be, within the year, this is a small matter, and we may presume a tenant for a vineyard for that short time could not be had.

The estate seems to be solvent. Otherwise the allowance could only be made for one year. That being so, I do not see what difference it makes that the vineyard is mortgaged. What the mortgagee does not get from the security he will get from the estate. The interest of the heirs, therefore, is to have the property preserved. Whether the duty of the executor would be different if the estate were insolvent we are not called upon to determine.

The court also reserved its conclusion as to the matter of the estoppel. Very likely there will be no occasion to determine it.

I find nothing in the matter of the *Estate of Knight*, 12 Cal. 200, 73 Am. Dec. 531, or in *Tompkins v. Weeks*, 26 Cal. 50, at variance with the views here expressed. Authority to the effect that an executor may not invest the funds of the estate in an outside venture is not authority upon which it can be held that an executor must not preserve the property which has come to his hands as executor. The last is his duty before all others. For any failure here he will be held liable. No other case cited seems to bear upon any issues raised here.

The decree is reversed and the case remanded for further proceedings.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 1111. Department One.—October 6, 1897.]

SUN INSURANCE COMPANY, Respondent, v. GEORGE E.
WHITE, Appellant.

APPEAL—MOTION OF RESPONDENT FOR REVERSAL—PARTIAL CONFESSION OF ERRORS.—On an appeal upon a judgment-roll containing a bill of exceptions in which there are many exceptions to the rulings of the court at the trial, not conceded by the respondent to be erroneous, and it is also claimed by the appellant that upon the findings of fact, judgment should have been rendered in appellant's favor, the respondent ought not to be allowed to foreclose an examination of the record, after the parties have had an opportunity to be heard upon the merits, by a confession of errors in certain particulars only, and a motion of respondent for reversal of the judgment, and that the cause be remanded for a new trial, upon such partial confession of errors, must be denied.

MOTION in the Supreme Court to reverse a judgment upon a confession of errors by respondent.

The facts are stated in the opinion of the court.

William T. Baggett, Dunne & McPike, Walter H. Linforth, and Johnson, Linforth & Whitaker, for Appellant.

Rhodes & Rhodes, for Respondent.

THE COURT.—The respondent herein has filed a confession of errors committed by the superior court, in that at the trial it erroneously overruled the objections of the appellant to the admission of certain evidence, and also that a certain finding of fact is not sustained by the evidence; and has moved thereon for a reversal of the judgment, and that the cause be remanded for a new trial.

The appeal is from the judgment alone, and is presented here upon the judgment-roll containing a bill of exceptions, in which are many exceptions to the rulings of the court at the trial not conceded by the respondent to be error, and also specifying many particulars in which the evidence is alleged to be insufficient to sustain other findings than the one designated by the respondent. The appellant resists the motion upon the ground that the confession of error does not extend to all errors assigned in the bill of exceptions, and upon the further ground that upon the find-

ings of fact made by the court it should have rendered judgment in her favor.

If it appears from the record upon an appeal from a judgment that the findings of fact made by the court below are such as to require judgment thereon in favor of the appellant rather than the respondent, this court is authorized to direct such judgment to be entered, unless it shall also appear that such findings are the result of evidence erroneously admitted or excluded. In such a case the court will direct a new trial. (Code Civ. Proc., sec. 53.) Such conclusion can be reached, however, only upon an examination of the record, and after the parties have had an opportunity to be heard upon the merits. The respondent ought not to be allowed to foreclose this examination and hearing by a confession of certain errors which may or may not be determinative of the rights of the parties.

The motion is denied.

[S. F. No. 638. Department Two.—October 6, 1897.]

PAUL BREON, Appellant, v. ANTON ROBRECHT, Respondent.

EJECTMENT—POSSESSION BY DEFENDANT PENDENTE LITE—EVICTION—STATUTE OF LIMITATIONS.—Where an action of ejectment, commenced within the statutory period of limitation, is prosecuted to a final judgment for the plaintiff, and the defendant is evicted under a writ of possession issued thereunder, the latter, although he has remained in possession during the pendency of the action, and five years have elapsed from the time at which he first took possession until his eviction, does not acquire a new or independent title by prescription, which either he or his grantee can afterward enforce notwithstanding his eviction under the judgment in ejectment.

ID.—POSSESSION CONFERS NO NEW RIGHTS.—During the pendency of the action of ejectment, the defendant can acquire no new rights as against the plaintiff by the mere fact that he remains in possession.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Scrivner & Schell, for Appellant.

Edward R. Taylor, for Respondent.

McFARLAND, J.—This is an action to quiet title to certain lands. Judgment went for defendant—the court finding “that defendant is the owner and seised in fee of all the lands” in contest, and that “plaintiff was not at the time of the commencement of this action, and never was at any time, the owner in fee or otherwise, or at all,” of said lands or any part thereof. The plaintiff appeals from the judgment upon a bill of exceptions which brings up only the judgment-roll and certain admitted facts.

Appellant has no ground for reversal unless this proposition be maintainable, namely: That although an action of ejectment be commenced within the statutory period of limitation, and although such action be prosecuted to a final judgment for plaintiff, and the defendant be evicted under a writ of possession issued under such judgment, still, if the defendant has remained in possession during the pendency of the action, and five years have elapsed from the time at which he first took possession until his eviction under the judgment, then he has acquired a new and independent title by prescription, which he can afterward enforce notwithstanding his eviction under the judgment in ejectment. If that be so, a successful plaintiff in ejectment, although he commenced his action within five years after the beginning of the adverse holding, gains nothing by his suit unless he can so control the machinery of the courts and the conduct of the defendant as to obtain a judgment and the execution of a writ of restitution within five years after the first unlawful entry of the defendant. But this proposition cannot be maintained.

It is true that the mere commencement of an action of ejectment which is afterward dismissed does not disturb an adverse possession. It is true, also, that a judgment in ejectment does not conclude a title acquired subsequently to its rendition; and perhaps it does not conclude a prior title which, owing to the peculiar character of the pleadings, findings, and judgment, is clearly not embraced in the decision—although the general rule is, that such a judgment concludes every right of possession which the defendant might have asserted under any title which he could have litigated in the action. Neither is it necessary for the purposes of this case, to consider the effect of an unexecuted judg-

ment upon adverse possession—as in *Carpenter v. Natoma Water etc. Co.*, 63 Cal. 616. An executed judgment for plaintiff in ejectment, where the suit had been commenced within the period of limitation, is conclusive against the defendant of any asserted right founded merely upon his possession either at the time of the commencement of the action or at the time of the judgment. During the pendency of the action he can acquire no new right as against the plaintiff by the mere fact that he remains in possession. During that period his right of possession is *sub judice*—"before the judge," awaiting judicial determination (*Kirsch v. Kirsch*, 113 Cal. 56); and a judgment against him judicially determines that down to the date of its rendition his possession, as against the plaintiff, has been wrongful. This principle is expressly recognized in one of the very authorities cited by appellant—*Thrift v. Delaney*, 69 Cal. 191—where the court say: "The bar of a judgment in such an action is, however, limited to the rights of the parties as they existed at the time when it was rendered, and neither the parties nor their privies are precluded by the same from showing in a subsequent action any new matters accruing after its rendition which gave the defeated party a title or right of possession." In *Satterlee v. Bliss*, 36 Cal. 514, the court say: "The judgment in the case of *Reese v. Mahoney et al.* is binding and conclusive upon the Mahoneys and all parties standing in privity with them, and estops them from denying that Reese was entitled, as against them, to the possession of the premises at the time of the rendition of the judgment."

The facts in the case at bar are, briefly, these: On April 23, 1885, one Reid went into the adverse possession of the lands in contest, without title. Within five years thereafter the present defendant, Robrecht, commenced an action (referred to by the parties as "ejectment") against Reid and others claiming to be his tenants, in which he averred that he was "the owner and entitled to the possession of" the said lands, and prayed for their restitution. The defendants in that action denied Robrecht's title, set up title in Reid, and also set up adverse possession; judgment was rendered in that action in June, 1895, by which it was found and decreed that Robrecht was the owner and entitled to possession of the lands and that Reid had no right, title, or interest therein. There was also a finding against the alleged adverse

possession, and Robrecht also recovered a certain sum of money for rents, profits, etc., during the time Reid had held possession. But in the same year, 1895, and shortly before said judgment was entered, Reid, who had remained in possession of the lands pending the suit, conveyed his interest therein to the present plaintiff, Breon, and put him in possession; Breon commenced this present action to quiet title about a month before the rendition of the judgment in the ejectment suit. A writ of restitution was issued on the judgment in the ejectment suit, under which the present plaintiff, Breon, was evicted and Robrecht placed in possession; and Robrecht was in possession when this present action was tried. It is admitted that the present plaintiff knew all the facts, and occupies the same position that Reid would have occupied if he had brought this action.

From the foregoing facts it is clear that title in the fullest sense was involved in said action of ejectment, and that the judgment in that action concluded every right which Reid had to the lands at the time of its rendition. (See *Marshall v. Shafter*, 32 Cal. 177; *Mahoney v. Middleton*, 41 Cal. 41; *Satterlee v. Bliss*, *supra*; *Byers v. Neal*, 43 Cal. 210; *Sampson v. Ohleyer*, 22 Cal. 200, and cases there cited.) In *Marshall v. Shafter*, *supra*, it was declared—we quote for brevity from the syllabus—that “if the respective titles of the parties, or their right to the possession of the demanded premises, are put in issue and tried in ejectment, and the plaintiff recovers judgment for possession, the judgment is an estoppel, and the defendant, to avoid the estoppel in a subsequent action to recover the same premises, must show some other right of possession than he had when the judgment was entered.” In *Byers v. Neal*, *supra*, it was declared that “a judgment for plaintiff in ejectment, when the title has been brought directly in issue, concludes the defendant against setting up in a subsequent proceeding any mere legal defense which he might have made in such suit.” But in the case at bar we are concerned only with the alleged right of appellant founded on the adverse possession of Reid, which was clearly concluded by the judgment in the ejectment suit. As was said in *Marshall v. Shafter*, *supra*, speaking of ejectment: “The judgment for plaintiff determines that he was entitled to possession at the commencement of the

action and the rendition of the judgment." In *Mann v. Rogers*, 35 Cal. 318, the court said: "The judgment in ejectment precludes the plaintiff in this action from asserting in another action any legal title which he held or could have made available on the trial of the former action." If the present plaintiff can maintain this action upon the alleged adverse possession of Reid, then Reid could have defeated the ejectment by filing a supplemental answer averring that since the commencement of the action his continued adverse possession had ripened into title; and, therefore, such alleged right, even if any conceivable value could be attached to it, was under the authorities above cited concluded by the judgment in ejectment.

The order appealed from is affirmed.

Henshaw, J., concurred.

TEMPLE, J., concurring.—I concur. By adverse possession during the statutory period the title of the true owner is not taken from him and vested in the person having the adverse possession. The owner is simply required to sue within a limited period. If he does not, he cannot maintain an action to recover the property. In such event the disseisor, being in possession, can maintain his right against the whole world. He could always prevail over all save the true owner, and when the owner cannot sue his title has become unassailable. But if the owner sues in time and recovers in that action, he cannot be barred by adverse possession pending his action, for the condition necessary to raise the bar has not existed. The owner has not lost his right by failing to sue. The defendant, during the pendency of the action, is in under the same claim of right he had when the suit was commenced, and the judgment determines that such claim is invalid. He has not acquired a new title by remaining in possession. His title by possession, good against all the world save the true owner, he already had. He has only the same title after the statute has run, but the true owner has then lost his right of action, and, therefore, the title of the disseisor acquired by possession has become inpregnable. Here the owner has not lost his title by failing to sue.

I think the judgment in the so-called ejectment conclusive against Reid, and all persons claiming under him.

On the 2d of December, 1897, the following opinion was rendered by Department Two:

THE COURT.—In this cause the appeal was from the judgment alone; there was no appeal from an order. The opinions heretofore delivered in the cause (*ante*, p. 469 correctly treated the appeal as an appeal from the judgment and were intended to close with an affirmance of the judgment; but by a clerical mistake it was unintentionally adjudged that “the order appealed from is affirmed.” The judgment of this court was accordingly entered affirming the “order” appealed from; and the mistake was not discovered until after the remittitur had gone to the court below. Thus the appeal from the judgment was left, technically, at least, undisposed of.

Now, therefore, for the reasons given in the opinions heretofore referred to, the judgment appealed from in this action is hereby affirmed.

[S. F. No. 1140. In Bank.—October 6, 1897.]

THOMAS MORTON, Petitioner, v. WILLIAM BRODERICK,
Auditor, etc., Respondent.

MANDAMUS—DUTY OF AUDITOR TO COMPUTE AND ENTER TAX LEVY.—It is the express statutory duty of the auditor to recognize, compute, and enter the tax levy in accordance with the rate fixed by the board of supervisors, and *mandamus* will lie to compel the performance of such duty.

ID.—TITLE TO OFFICE INCIDENTALLY INVOLVED—INADEQUATE REMEDY AT LAW —TAX LEVY BY CONFLICTING BOARDS OF SUPERVISORS—INQUIRY AS TO DE FACTO BOARD.—The general rule that *mandamus* will not lie to determine the title to an office, applies when there is a plain, speedy, and adequate remedy at law to determine such title; but where the writ is sought to enforce a specific duty enjoined by law, and the remedies at law are inadequate, aid will not be refused merely because the occupancy or incumbency, or title to an office is incidentally involved, and in such case rights will be inquired into and determined so far as and no farther than may be necessary to the granting of the relief sought; and the fact that two distinct tax levies have been made by conflicting boards of supervisors, and that the inquiry upon *mandamus* to the auditor to compel the entry of one of the levies, incidentally involves the determination as to which of the conflicting boards is *de facto* in office, and has the better apparent legal right to make the tax levy, constitutes no objection to the proceeding in *mandamus* against the auditor.

1D.—PROCEEDING TO REMOVE BOARD OF SUPERVISORS—NEGLECT IN FIXING WATER RATES.—CONSTITUTIONAL QUESTION APPROPRIATE TO APPEAL.—Where a proceeding was instituted in the superior court to remove a board of supervisors from office for neglect to fix water rates in the month of February, the question as to the constitutionality of the statute under which the proceeding was had is more appropriate to be determined upon appeal from the judgment removing the board, than upon *mandamus* to enforce a tax levy made by the *de facto* board of supervisors.

1D.—NATURE OF PROCEEDING—JUDGMENT OF FORFEITURE—CIVIL ACTION—PARTIES.—Where a proceeding for the removal of a board of supervisors was in the form of a civil action, brought at the instance and in the name of a private individual, and the defendants were served with the summons required in a civil action, and the cause was conducted throughout as would be a civil trial, without a jury, a judgment of forfeiture of office rendered against the board in such action must be deemed rendered under civil process as respects the effect of an appeal therefrom; and the judgment cannot be upheld as having been rendered in a criminal proceeding, regardless of whether the statute contemplates a civil or criminal proceeding, inasmuch as a criminal proceeding could only be conducted in the name and by the authority of the people of the state and not by a private person.

1D.—APPEALS IN SPECIAL CASES—CONSTITUTIONAL LAW—JUDICIAL CONSTRUCTION OF FORMER CONSTITUTION—RE-ENACTMENT—ACQUIESCENCE.—The former constitution having been judicially construed to empower the legislature to provide for appeals to the supreme court in special civil proceedings of a summary character, its language, re-enacted in the present constitution, will be concluded to have been adopted with the interpretation and construction which the courts had enunciated; and where the construction of the present constitution has been fixed by long acquiescence and sanction both of the legislature and of the courts in favor of the right of appeal in special cases, it cannot be open for decision to the contrary as a new question.

1D.—JUDGMENT REMOVING BOARD OF SUPERVISORS—EFFECT OF APPEAL—SUSPENSION OF JUDGMENT—RESTORATION OF LEGAL RIGHT.—An appeal to the supreme court from a judgment removing a board of supervisors for neglect to fix water rates at the required time *ipso facto* operates as a *superædæas*, and suspends the effect of the judgment, so as to restore the board to its right to continue in office until the final determination of the appeal.

1D.—APPOINTMENT AND QUALIFICATION OF NEW BOARD IMMATERIAL—RIGHT OF INCUMBENCY OF APPEALING BOARD.—The fact that a new board of supervisors was appointed, qualified, and met and organized after the announcement of the decision, and before the entry of judgment removing the board of supervisors, and the taking of an appeal therefrom, is immaterial, and cannot affect the legal right of the appealing board to retain the incumbency of the office, where it appears that on the day of the entry of the judgment of removal it immediately perfected an appeal, and continued thereafter to act as a board of supervisors.

1D.—EFFECT OF CONFLICT OF INCUMBENCY—LEGAL RIGHT DISTINGUISHING OFFICERS DE FACTO.—Where conflicting boards or officers are acting simulta-

ously, each under a claim of right, since there cannot be two *de facto* boards or officers, that one alone will be recognized as the *de facto* board or officer which is acting at the time under the better apparent legal right; and, in such case, the title to the office *de jure* draws to it the possession *de facto*.

ID.—TAX LEVY OF SAN FRANCISCO—SIGNATURE OF MAYOR NOT REQUIRED—CONSTITUTIONAL AMENDMENT—ACT OF 1897 INAPPLICABLE—MUNICIPAL AFFAIRS NOT SUBJECT TO GENERAL LAWS.—The act of 1897 requiring the signature of the mayor to a tax levy does not apply to the city and county of San Francisco, as it deals with municipal affairs which, by the constitutional amendment of 1895, are exempted from the control of general laws in cities and towns not organized under the general scheme embraced in the municipal incorporation act, but which are organized under special charters; and the signature of the mayor of San Francisco is not required in order to the validity of a tax levy made by its board of supervisors.

WRIT of Mandate from the Supreme Court to the Auditor of the City and County of San Francisco.

The facts are stated in the opinion of the court.

Garrett W. McEnerney, E. S. Pillsbury, and John Garber, for Petitioner.

Mandamus is the proper remedy in this case. (Code Civ. Proc., sec. 1085; *People v. Olds*, 3 Cal. 167; 58 Am. Dec. 398.) The fact that conflicting claims to office are incidentally involved does not preclude *mandamus* to enforce a public duty enjoined by law, and the court may decide the case upon its merits, according to the present apparent title. (*State v. Mayor, etc.* 52 N. J. L. 332; *Lawrence v. Hanley*, 84 Mich. 399, 403, 404; *Nathan v. Tompkins*, 82 Ala. 437, 446; *Moses v. Tompkins*, 84 Ala. 613, 616, 617; *Johnston v. Jones*, 23 N. J. Eq. 216; *Mechanics' Bank v. Burnet Mfg. Co.*, 32 N. J. Eq. 236, 238, 239; *Kennedy v. Board of Education*, 82 Cal. 483; *Crowell v. Lambert*, 10 Minn. 369; *State v. Johnson*, 35 Fla. 2; *State v. John*, 81 Mo. 13; *State v. Jaynes*, 19 Neb. 161; *Metsker v. Neally*, 41 Kan. 122, 124, 125; 13 Am. St. Rep. 269.) The action to remove the board of supervisors was a special case of a civil nature, of which this court has appellate jurisdiction. (*Parsons v. Tuolumne Co. Water Co.*, 5 Cal. 43; 63 Am. Dec. 76; *Stockton etc. R. R. Co. v. Galgiani*, 49 Cal. 140; *Pacific Undertakers v. Widber*, 113 Cal. 201; *Covarrubias v. Supervisors etc.*, 52 Cal. 622.) The prompt and immediate appeal taken by the defendants in that

action as soon as the judgment was entered, suspended the operation of the judgment, and entitled them to remain in office pending the appeal. (*Covarrubias v. Supervisors*, *supra*; *Spears v. County of Modoc*, 101 Cal. 303, 304; *Pierce v. Birkholm*, 110 Cal. 669; *Harris v. Barnhart*, 97 Cal. 550; *Naftzger v. Gregg*, 99 Cal. 83; 37 Am. St. Rep. 23; *Estate of Blythe*, 99 Cal. 472; *Brown v. Campbell*, 100 Cal. 646; 38 Am. St. Rep. 314; *Ruggles v. Superior Court*, 103 Cal. 125; *People v. Treadwell*, 66 Cal. 400; *Born v. Horstmann*, 80 Cal. 452; *In re Schedel*, 69 Cal. 241; *In re Woods*, 94 Cal. 566; *Stateler v. Superior Court*, 107 Cal. 536; *Pennie v. Superior Court*, 89 Cal. 31; *Dennery v. Superior Court*, 84 Cal. 7; *Palache v. Hunt*, 64 Cal. 473; *Havemeyer v. Superior Court*, 84 Cal. 380, 381; 18 Am. St. Rep. 192; *Murray v. Green*, 64 Cal. 363; *Kirsch v. Kirsch*, 113 Cal. 56.) There can be no right of a successor until the determination of the rights of the predecessor in office. (*State v. Williams*, 25 Minn. 340.) Forcible dispossession counts for nothing. (*State v. Draper*, 48 Mo. 213.) Recognition of the mayor counts for nothing. (*Braid v. Theritt*, 17 Kan. 468.) Possession was never surrendered by the *de jure* elected board, and the present title to the office *de jure* draws to it the possession *de facto*, where the incumbency is contested. (*State v. Mayor*, *supra*; *People v. Scrugham*, 20 Barb. 302, 305; *Hallgren v. Campbell*, 82 Mich. 255, 262; 21 Am. St. Rep. 557; *Metsker v. Neally*, 41 Kan. 122; 13 Am. St. Rep. 269; *State v. John*, *supra*; *State v. Jaynes*, *supra*; *Lawrence v. Hanley*, 84 Mich. 399, 403, 404.)

Thomas V. Cator, for Intervenor, Joseph Greenberg, and in support of the application for writ of mandate.

The judgment in case of *Fitch v. Supervisors* is void upon its face, and may be collaterally attacked. (*Ex parte Nielsen*, 131 U. S. 176; *Ex parte Cuddy*, 131 U. S. 280; *People v. Liscomb*, 60 N. Y. 559; 19 Am. Rep. 211.) The statute of 1881, under which that proceeding was had is unconstitutional, forfeiture of office not being a penalty within the meaning of article XIV of the constitution. (*Chicago etc. R. R. Co. v. People*, 67 Ill. 11; 16 Am. Rep. 599; *People v. Nedrow*, 122 Ill. 366, 367.) The removal of an entire board, including the innocent with the guilty, is not due process of law. (*Chicago etc. R. R. Co. v. Peo-*

ple, *supra*.) The statute authorizes only the board to be heard and denies a hearing to its innocent members. But the right to a hearing is essential to due process of law against any individual or officer. (*Ex parte Robinson*, 19 Wall. 505, 512.) The statute violates article VI, section 20 of the constitution, in authorizing a prosecution in the name of a private person. The right of a defendant to be prosecuted for a public offense in the name of the people is a constitutional right, and this provision is mandatory and self-executing. (*Hyatt v. Allen*, 54 Cal. 353; *Ewing v. Mining Co.*, 56 Cal. 649.)

H. T. Cresswell, William T. Baggett, George W. Schell, and E. W. McKinstry, for Respondent.

Mandamus cannot be resorted to compel a ministerial officer to accept one of two tax levies presented by contending boards of supervisors, thus compelling him to act in a particular way. (*Flagley v. Hubbard*, 22 Cal. 35; *People v. Weston*, 28 Cal. 640.) The title to office cannot be inquired into upon *mandamus*. (*People v. Olds*, 3 Cal. 167; 58 Am. Dec. 398; *Fish v. Weatherwax*, 2 Johns. Cas. 217; *People v. Stevens*, 5 Hill, 616; *Kelly v. Edwards*, 69 Cal. 460; *State v. John*, 81 Mo. 13; *Leach v. Cassidy*, 23 Ind. 449; *Meredith v. Supervisors*, 50 Cal. 433; *People v. Hurvey*, 62 Cal. 508; *People v. Sassovich*, 29 Cal. 480; *Hull v. Superior Court*, 63 Cal. 177; *Satterlee v. San Francisco*, 23 Cal. 314.) The supreme court has no original jurisdiction of a proceeding to try title to an office. (*People v. Harvey*, *supra*.) There is no appeal from the judgment in the suit of *Fitch v. Supervisors*. (Const., art. VI, sec. 4; *Houghton's Appeal*, 42 Cal. 35; *Bixler's Appeal*, 59 Cal. 550; *In re Curtis*, 108 Cal. 661; *Wheeler v. Donnell*, 110 Cal. 655.) No appeal therefrom could operate as a stay of proceedings. (Code Civ. Proc., sec. 997.) The judgment of removal was self-executing, and its operation as such could not be destroyed or impaired by appeal. (*Foster v. Superior Court*, 115 Cal. 279; *Dulin v. Pacific etc. Co.*, 98 Cal. 304; *Walls v. Palmer*, 64 Ind. 493; *Welch v. Cook*, 7 How. Pr. 282; *People v. Conover*, 6 Abb. Pr. 220; *Allen v. Robinson*, 17 Minn. 120; *Fulgham v. Johnson*, 40 Ga. 164; *Ellison v. Raleigh*, 89 N. C. 125; *Utica Ins. Co. v. Scott*, 8 Cow. 721, 722.) In so far as a judgment has been executed, its operation can-

not be stayed by appeal, so as to have any retroactive effect upon the execution of the judgment. (*Gutierrez v. Superior Court*, 106 Cal. 171; *Board etc. v. Gorman*, 19 Wall. 661; *Runyon v. Bennett*, 4 Dana (Ky.) 598; 29 Am. Dec. 431; *Ellison v. Raleigh*, *supra*.) The levy of the old board is invalid as it lacks the signature of the mayor. (Stats. 1897, p. 190; *People v. McCreery*, 34 Cal. 432.)

M. M. Maginnis, *Amicus Curix*.

Under section 1 of article XIV of the constitution the board of supervisors is not liable to any "further" or additional processes or penalties, for failure to fix water rates in the month of February; unless it has first been subjected to "peremptory process to compel action at the suit of any party interested," and the removal of the board of supervisors from office in a case where there has been no peremptory process to compel action, is without constitutional authority and void.

HENSHAW, J.—This is an original proceeding in mandate, brought to compel the auditor, as the performance of an official duty, to compute and enter the taxes upon the assessment-roll in conformity with the rates fixed by orders of a body claiming to be the board of supervisors of the city and county of San Francisco, which body for convenience may hereafter be designated the old board.

The auditor made answer. Certain facts were admitted; to others, upon which issue was joined, evidence was addressed. They will be set forth as may be necessary for the consideration of the legal propositions calling for determination.

1. By respondent it is first insisted that as there are two bodies, each claiming to be and acting as the board of supervisors, before the writ prayed for may issue title to the office must be tried: that *mandamus* will not lie to try title to office, and that therefore the application for the writ must be denied. The facts bearing upon this matter are the following: A proceeding was instituted in the superior court based upon the provisions of article XIV, section 1, of the constitution, and upon an act entitled "An act to enable the board of supervisors," etc. (Stats. 1881, p. 54), to remove the old board from office for its failure to fix water

rates in the month of February. A judgment of removal was entered against the board, and against the individual members composing it, upon September 16, 1897, and upon the same day the defendants gave notice of and perfected their appeal.

The governor of the state and the mayor of San Francisco, each deeming that vacancies were created by the judgment, and that in himself was vested the power to fill them, appointed the same twelve men as supervisors, who may be described as constituting the new board. Mixed questions both of fact and law are here presented as to the validity of the appointments, the time of qualification, and the like, which we need not pause to determine. The undisputed facts are that the new board met upon the morning of September 16, 1897, the mayor sitting with it, and then and thereafter contended and contends that it is the *de jure* board of supervisors, and that in any event it is the *de facto* board. A majority of the old board met in pursuance to adjournment upon the afternoon of the same day in the board rooms of the City Hall, and thereafter continued to hold meetings from time to time, and to transact business, the mayor and the clerk, however, refusing to recognize its official existence. Upon the morning of Monday, the twentieth day of September, the old board was in personal possession of the board rooms; the new board was convened to meet at the same place. Upon the refusal of the members of the old board to vacate their seats and the room, they were removed by physical force through the instrumentality of the police, acting under instructions of the mayor. They then convened in an adjoining committee room, and from this in like manner were ejected. Access to the board rooms being thus denied them, their subsequent meetings were held in the corridors of the City Hall, and finally in a room of a neighboring hotel. Both boards framed appropriate orders, and presented their tax rates to the auditor. He accepted neither. Upon his refusal to act, this proceeding was instituted.

It is not disputed that it is the express duty of the auditor to recognize, compute, and enter the tax levy in accordance with the rate fixed by the board of supervisors. (Pol. Code, secs. 3714, 3731, 3732.) It is not questioned but that one or the other of the rates presented is legal, and should be accepted by the auditor

as an act especially enjoined upon him by law. Yet, notwithstanding that *mandamus* lies to compel the performance of such an act, and, indeed, that it is usually the only effective proceeding for the purpose, it is contended that in this case it will not lie, because title to office is necessarily involved. Since the auditor could make the same defense to an attempt by the new board to compel him to recognize its rate, it would then result that performance of this most important official duty could never be speedily or effectively enforced, or enforced at all. It is the undoubted rule that *mandamus* does not lie to try title to office. But this is founded upon the just and expedient principle that the writ will never issue when the remedy at law is plain, speedy, and adequate. An application for a writ of mandate to try title to office would be answered at once by the suggestion that the law affords adequate process and procedure by an action of *quo warranto* or usurpation of office. But when the writ is invoked to enforce a specific duty, and remedies at law are not adequate, aid will not be refused merely because occupancy or incumbency or title is incidentally involved. It will act under such circumstances as does equity, and inquire into and determine rights so far as, but no further than, may be necessary to the granting of the relief sought. The cases in which the doctrine is invoked that *mandamus* will not lie to try title to office are those like *People v. Olds*, 3 Cal. 167, 58 Am. Dec. 398, and *Kelley v. Edwards*, 69 Cal. 460, where, the respondent being admitted or proved to be at least a *de facto* officer, the express purpose of the action upon the part of the petitioner is to establish in himself a superior legal right to the office. And this the courts uniformly hold may not be done in *mandamus*. For it once being established that the respondent is a *de facto* officer, as the law, for grave reasons of public policy, holds valid the acts of such an officer, the question of legal title, which alone is sought to be litigated, will be relegated to another forum. So in a case such as the present, if it be either admitted or established that one or another of the boards is a *de facto* body, the need of further inquiry comes to an end, since the official acts of that body are entitled to recognition by the auditor and are valid. In support of this principle

may be cited *Lawrence v. Hanley*, 84 Mich. 399; *State v. Draper*, 48 Mo. 213; *State v. Atlantic City*, 52 N. J. L. 332; *People v. Scrugham*, 20 Barb. 302; *Crowell v. Lambert*, 10 Minn. 369; *State v. Johnson*, 35 Fla. 2; *State v. Jaynes*, 19 Neb. 161; *State v. John*, 81 Mo. 13; *Johnston v. Jones*, 23 N. J. Eq. 216; *Merchants' Nat. Bank v. Burnet Co.*, 32 N. J. Eq. 236; *State v. Williams*, 25 Minn. 340.

So the question of the legal title to the office, as between the contending boards, is not involved in this proceeding, for it is the right of either to act, as contradistinguished from the title which either has to the office, into which this inquiry goes; and even if the law were not so well settled as it is in favor of the power of the court to enter upon such inquiry in *mandamus*, the grave consequences which must follow the present unsettled condition of municipal affairs, the delay, confusion, and injury to private and public interests by reason of the uncertainty, the disaster which would follow a failure to levy and collect taxes, and the high demand of public policy that public officers should be positively known, and the terms and tenures of their offices definitely assured, would be warrant enough to prompt a court to retain this proceeding, when no express law prohibits it.

2. Upon the hearing, argument was advanced to show the unconstitutionality of the act under which these proceedings were had. If these arguments are sound, it would of necessity follow that the judgment of the trial court is not merely voidable upon appeal, but absolutely void. These questions are passed, not as being unimportant, but as being more appropriate for determination upon the appeal from the judgment.

3. Upon the character of the proceeding before the trial court, it was insisted by respondent that it was essentially criminal, and that under a criminal judgment of forfeiture an appeal does not stay the execution of the judgment, nor reinstate the evicted officer. Some countenance is given to this contention by the definition of crime in the Penal Code (sec. 15), and by the language of the act itself, which designates the failure to fix rates as "malfeasance," of which the board is to be "deemed guilty," and provides for a "forfeiture" of office upon "conviction." But the legislature may provide that an act of misfeasance, nonfeasance, or malfeasance—in short, any dereliction in official duty—may

work a forfeiture of office, yet that act need not necessarily be a crime. It may be made a crime punishable by forfeiture under criminal proceeding; but equally it may be made a dereliction working a forfeiture under civil process. Prolonged absence of judicial officers from the state (Const., art. VI, sec. 9), the failure of the sheriff promptly to account for fees collected (Pol. Code, sec. 4186), are acts working forfeiture of office, which may be exacted in a civil trial. In this case the proceedings *ab initio* were civil in form. The action was at the instance and in the name of a private individual, the defendants for process were served with the summons required in a civil action, and throughout the cause was conducted as would be a civil trial without a jury. Finally, respondent's contention that the proceeding is criminal, if upheld, works the utter destruction of his cause. For, if criminal, then indisputably defendants were denied a right reserved to them and to all by the constitution of the state, namely, that all prosecutions shall be conducted in the name and by the authority of the people of the state of California, and not by a private person. (Const., art. XI, sec. 20.) But it is not necessary to decide whether the proceeding was or was not criminal. The matter will be discussed upon the assumption that it was a civil action, since otherwise it cannot be upheld.

4. Treating, then, the judgment in the case of *Fitch v. Board of Supervisors* as a judgment rendered in a special civil proceeding of summary character, it is next insisted by respondent that the constitution has not provided for appeals in such proceedings, that the legislature has not the power to do so, and that the judgment of the trial court is, therefore, an absolute finality. Were this question a new one, much weight would be due respondent's argument upon the matter. But for the following reasons it cannot be opened for decision as *res nova et integra*: 1. Because, under identical language in the earlier constitution of the state (Const. 1849, art. IV, sec. 19; Const. 1879, art. IV, sec. 18), it was held by our predecessors that the constitution itself empowered the legislature to provide for appeals in special proceedings; 2. In re-enacting in the later constitution the language of the earlier, it will be concluded that it was adopted with the interpretation and construction which the courts had enunciated (*Sharon v. Sharon*, 67 Cal. 185; *Lord v. Dunster*, 79 Cal. 477;

McBean v. Fresno, 112 Cal. 159; 53 Am. St. Rep. 191); 3. Since the adoption of the present constitution, this court, in accordance with that principle and under the authority of sections 52 and 939 of the Code of Civil Procedure, has unquestioningly retained jurisdiction of such appeals in a multitude of cases of different kinds; and this long acquiescence and sanction both by the legislature and by the courts fixes the construction; 4. The precise question was before this court in *Bank* in 1889, and it was then held without dissent that the present constitution was not more restrictive than the earlier, and that the supreme court had appellate jurisdiction in such cases. (*Lord v. Dunster, supra.*) It is said: "Under these circumstances, and in view of the fact that there is nothing in the language of the constitution of 1879 making the original jurisdiction of the superior court final or conclusive to any extent greater than was that of the county court in such cases, or restricting the right of appeal to this court, we do not feel called upon to say whether the reasoning of the court in *Knowles v. Yates* is sound. It is sufficient to say that the conclusion therein reached has been sanctioned by long acquiescence on the part of the legislature and the courts. It has been decided that 'a contemporaneous exposition, even of the constitution of the United States, practiced and acquiesced in for a period of years, fixes the construction.' (1 Kent's Commentaries, 465, note; *Packard v. Richardson*, 17 Mass. 143; 9 Am. Dec. 123; *Curtis v. Leavitt*, 15 N. Y. 217; *People v. Fitch*, 1 Cal. 523; Civ. Code, sec. 3535.) When the framers of the constitution employ terms which have received judicial interpretation, and have been put into practice under a former constitution so as to receive a definite meaning and application, it is safe to give them the signification which has been sanctioned by such interpretation, unless it is apparent from the language used that a more general or restricted sense was intended. In determining the meaning of a constitutional provision, it will be presumed that those who framed and adopted it were conversant with the interpretation which had been put upon it under the constitution from which it was copied; and this is the rule even as to provisions taken from the constitutions of other states—the judicial construction placed upon them in the

states from which they are taken will be followed by the courts in the state which adopts them."

Lastly, in *In re Marks*, 45 Cal. 199, which was a special proceeding such as this to remove an officer for misconduct, it was held that an appeal would lie. In that case, the act itself provided for an appeal, while now the right of appeal is conferred by sections 52 and 939 of the Code of Civil Procedure.

5. What may be the effect of the appeal in a case such as this is a question fully answered in *Covarrubias v. Supervisors*, 52 Cal. 622. Covarrubias, sheriff of the county, had been removed from office by summary civil procedure. Upon the day of the entry of the judgment he perfected his appeal. The supervisors, believing a vacancy to exist in the office, were about to fill it, when Covarrubias, made application to the supreme court for a writ of prohibition. It was held that he had an appeal from the judgment of the trial court, and that the appeal, when well taken, "*ipso facto* operated a *supersedeas*." Whether, then, the judgment in such a case be considered a self-executing judgment or not, the appeal is equally self-executing and restores the officer to his rights of office until its final determination. Nor could the facts, if they be deemed proved, that the new board was appointed and qualified and met and organized before the judgment was entered and the appeal taken, affect in any way the legal situation. The case is not that of an official who, after judgment, retires from his office and leaves it to his appointed successor, who, clothed with its insignia and surrounded by its indicia, acts in an official capacity. Thereafter, if the ousted officer who had thus voluntarily retired should endeavor in *mandamus* to assert a legal title against one who was clearly *de facto*, the court, as has been said, would in such a proceeding go no further than to determine that the office was full *de facto*. But in this case there was never any voluntary surrender or withdrawal upon the part of the old board. It maintained its right to act, and continued to act, as a board of supervisors during all the time. So also, it is true, did the new board; but there cannot be at one and the same time two *de facto* officers, any more than there can be two *de jure* officers. This case is one where two contending boards are simultaneously acting and claiming the right to act. In such

a case, it is sometimes said that the title to the office *de jure* draws to it the possession *de facto*. (*State v. Atlantic City, supra*.) This, however, is but a concise expression of the rule that in *mandamus*, where conflicting boards or officers are acting simultaneously, each under a claim of right, since there cannot be two *de facto* boards or officers, that one alone will be recognized as the *de facto* board or officer which is acting at the time under the better apparent legal right. (*Braid v. Theritt*, 17 Kan. 468; *Hamlin v. Kassafer*, 15 Or. 456; 3 Am. St. Rep. 176; *State v. Draper, supra*; *State v. Johnson, supra*; *Lawrence v. Hanley, supra*; *State v. Atlantic City, supra*.)

Until the judgment of removal, the old board was the unquestioned *de jure* and *de facto* body. Upon the day of the entry of the judgment an appeal from it was perfected. The members of the old board never abandoned their offices, but always acted and claimed the right to act. Even if it be said that the judgment was self-executing, and that a vacancy existed upon the entry of judgment by operation of law and without process of the court, it must necessarily follow, under the decision in the Covarrubias case, that it existed only until an appeal from the judgment was perfected, and that this appeal restored the incumbent to his rights of office until final determination of the controversy, and that, therefore, the better present, apparent, legal right is with the old board.

6. The final contention of the respondent in the matter is, that the levy of the old board is illegal and invalid because it lacks the signature of the mayor of the city and county of San Francisco. That signature in terms is required by the provisions of an act of the legislature of 1897, entitled "An act to require ordinances and resolutions passed by the city council, or other legislative body of any municipality, to be presented to the mayor, or other chief executive officer of such municipality, for his approval." (Stats. 1897, p. 190.) Prior to the passage of this act it was not required. (*Truman v. Board*, 110 Cal. 128.) But before this act it had been believed by the legislature and by the people that it would be wiser to relieve charters of cities from the operation of general laws affecting municipal affairs, lest otherwise there would be danger of the charter provisions being en-

tirely "frittered away." In accordance with this belief, an amendment to the constitution was adopted in 1895 (Stats. 1895, p. 450) providing that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, *except in municipal affairs*, shall be subject to and controlled by general laws." The amendment is found in the italicized words. The act of 1897 unquestionably deals with a municipal affair, the mode and manner of the passage of ordinances and resolutions provided for in the charter. Under this constitutional amendment, such acts now apply only to cities and to their charters which have organized under the general scheme embraced in the municipal corporation act. (Stats. 1883, p. 93.) San Francisco is not one of such cities, and the act of 1897 has, therefore, no application to it.

For the foregoing reasons, a peremptory writ of mandate should issue as prayed for, and it is ordered accordingly.

Beatty, C. J., Van Fleet, J., Harrison, J., McFarland, J., and Temple J., concurred.

GAROUTTE, J., concurring.—Section 1 of the act of the legislature found in the Statutes of 1881, which deals with the fixing of water rates, casts a duty upon the board of supervisors of the city and county of San Francisco of fixing those rates in the month of February of each year. Section 8 of the same act declares: "Any board of supervisors or other legislative body of any city and county, city, or town, which shall fail or refuse to perform any of the duties prescribed by this act at the time and in the manner hereinbefore specified, shall be deemed guilty of malfeasance in office, and, upon conviction thereof at the suit of any interested party in any court of competent jurisdiction, shall be removed from office." The board of supervisors of the city and county of San Francisco failed to fix water rates in the month of February, and thereupon, at the suit of one Fitch, and under the authority found in the aforesaid section of the act of 1881, the supervisors of said city and county have been removed from office by the judgment of the superior court.

The construction given this act by the learned judge of the trial court, as evidenced by the judgment rendered, is that the

word "board" has reference to and includes individually all the members of the board. This is apparent when, upon inspection, we find the judgment removing each member of the board from office. This construction is evidently the sound one, and the only reasonable one that can be given the act, for a "board of supervisors" is an entity only when in session. It could not be guilty of a malfeasance in office, and certainly could not be convicted of a malfeasance in office. Again, the "board" holds no office, and therefore of necessity could not be removed from office. Hence, the section has no intelligible meaning, unless the word "malfeasance" be held as applying to the members individually constituting the board. This is the necessary construction of the act, and such construction renders it palpably unconstitutional. It violates fundamental principles of law. The legislature has no power arbitrarily to deprive men of valuable rights. It has no power to declare an office forfeited because, forsooth, the holder of another office has failed to do his duty. Justice is not administered that way. Proceedings under this section are quasi criminal, and one person may not be punished for the crimes of another. Under this section the innocent and the guilty are punishable alike, and the law never justifies the punishment of a person who has committed no crime. A public official who has done his duty in all things is not guilty of malfeasance in office, and the legislature has no power to so declare. If section 8 of the act had declared the penalty to be a fine of five hundred dollars, or an imprisonment in the county jail for thirty days, rather than removal from office, it could hardly be contended by anybody that a supervisor who had done everything in his power to carry out the law in the fixing of water rates could be fined or imprisoned because the rates were not fixed in the month of February. No act of the legislature could furnish legal justification for such a proceeding; and the fact that this judgment is one of forfeiture of office, rather than fine or imprisonment, is wholly immaterial.

The legislature has power to fix the tenure of office. It has the power to declare that upon the happening of a certain event that official tenure shall cease; but it is evident that such was not the intention here. By this act the legislature was not fixing terms

of office. This section was enacted in furtherance of the constitutional provision which provides that the legislature may declare penalties for a failure to fix water rates. The purpose of the legislature in enacting section 8 was to visit a penalty upon each member of the board of supervisors in the form of a forfeiture of office for a neglect of the board to fix rates. The phrases "guilty of malfeasance in office," and "upon conviction," which are found in the act, abundantly indicate that this was the purpose of the section.

Section 11 of article XX of the constitution declares: "Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes." We here find "malfeasance in office" placed in the category of high crimes, and the legislature directly empowered to cut off the rights of citizenship from all those adjudged guilty thereof. The supervisors have been convicted of malfeasance in office. Grave consequences follow from such a conviction, and no legislative act, however explicit its intention, can visit those consequences upon innocent men.

For the foregoing reasons, the law is unconstitutional, the judgment of the trial court removing the individual members of the board of supervisors from office void, and the writ of mandate should issue. I concur in the judgment.

[No. 19466. In Bank.—October 7, 1897.]

CALIFORNIA LOAN AND TRUST COMPANY, Respondent,
v. **H. F. WEIS**, and **H. W. WEINEKE**, as Tax Collector of
San Diego County, Appellants.

TAXATION—PARAMOUNT LIEN.—The legislature has power to make the lien of taxes paramount to all other liens upon land, so that where sale is made the purchaser takes title free from encumbrance.

ID.—TITLE OF PURCHASER—LIEN OF PERSONAL PROPERTY TAX.—Under section 3717 of the Political Code, every tax due upon personal property is a lien upon the real property of the owner thereof from and after 12 o'clock, M., of the first Monday in March in each year; and in pursuance of the provisions of article XIII, section 4, of the constitution, and of sections 3716 and 3788 of that code, such lien, and

the title which a purchaser gets under a sale of the land for delinquent personal property taxes, is paramount to the lien of a mortgage which attached to the land prior to the lien of such tax.

ID.—DELINQUENT LIST—ADDITION OF PERSONAL PROPERTY TAX.—In section 3764 of the Political Code, requiring the delinquent list to contain the amount of taxes and costs due, opposite each name and description, "with the taxes due on personal property added to taxes on real estate," the word "added" does not contemplate a mathematical computation, but merely that the amount of the delinquent personal property tax be subjoined or appended to the taxes on the real estate.

ID.—TIME OF DELINQUENT SALE—REPORT TO AUDITOR.—In construing the conflict between section 3797 of the Political Code, as amended in 1891, and sections 3800, 3764, and 3768 of the same code, providing for the various steps to be taken by the tax collector for the publishing of the delinquent list, the sale for delinquent taxes, and his report to the auditor, it must be held that the date fixed by section 3797 for the tax collector's settlement with the auditor, to wit, the third Monday in June, is merely directory, and that the settlement may be had at some reasonable time after the sale, or that by clerical misprision the word "June" was inserted for the word "July"; and, so construed, a sale made on the 12th of July is valid.

APPEAL from a judgment of the Superior Court of San Diego County. W. L. Pierce, Judge.

The facts are stated in the opinion of the court.

Sylvester Kipp, for Appellant Weis.

M. L. Ward, for Appellant Weineke.

Ripley & Nutt, for Respondent.

HENSHAW, J.—Appeal from the judgment after demurrer overruled, defendants declining to answer.

Upon March 1, 1891, the Otay Watch Company was the owner of the land in controversy. There was at and prior to that date a mortgage upon the land, executed by the watch company to plaintiff. For purposes of taxation in the year 1891-92 the land was assessed at \$720, of which \$616 was assessed upon the mortgage interest, and the remainder, \$104, upon the interest of the owner, the Otay Watch Company. There was also assessed to the Otay Watch Company, for the same year, personal property at the sum of \$6,200. The plaintiff paid its tax on its mortgage interest in said land before it became delinquent. But the tax levied on the owner's interest, assessed at \$104, as well as the tax

on its personal property, remaining unpaid, the tax collector advertised the land, together with other lands of the Otay Watch Company, the taxes upon which were unpaid in the delinquent list, and, at the foot of the list, added the following: "Personal property—valuation, \$6,200; taxes, percentage, and costs, \$147.81." On the eighteenth day of May, 1892, the plaintiff acquired a sheriff's deed to said premises, upon proceedings to foreclose said mortgage against the Otay Watch Company. On July 12, 1892, the tax collector sold the land, which is the subject of the action, for the taxes, percentage, and costs against the owner's interest in said land, being \$3.39, and also for the said sum of \$147.81 taxes, percentage, and costs accrued upon the personal property tax. On August 30, 1893, the plaintiff tendered to the county treasurer full redemption of real estate from the sale so far as such sale proceeded upon the tax against the owner's interest; but the offer to redeem was refused on the ground that the property had been sold for the aggregate amount of such real estate and personal tax delinquency, "and that he could not therefore permit said plaintiff to redeem said real estate alone from said sale for delinquent real estate tax."

The plaintiff brings this action to quiet title, and to restrain the tax collector from executing his deed, and continues its offer to pay and redeem from the tax assessed against the owner's interest in the land.

The defendant Weis is the purchaser of the property at the tax sale, and the defendant Weineke is the tax collector of the county.

1. The appellant Weis contends that the personal property tax of \$147.91, due from the watch company, became a lien upon the land in question, which lien, though subsequent in time to plaintiff's mortgage upon the same land, is superior in law; and that the tax collector's sale to enforce collection of the taxes operated to convey the land to him free from the lien of the mortgage.

Upon the part of respondent it is answered: 1. That the statutory proceedings for enforcing the collection of personal property taxes by a sale and conveyance of land by the collector has no application to land encumbered by a mortgage, the lien of

which antedates the lien of the tax; and 2. That the lien for the personal property tax created by section 3717 of the Political Code does not extend to or include, or in any manner affect, the interest in the land which the loan and trust company, as mortgagee, had acquired prior to the time fixed by law for the taking effect of the lien for the personal property tax.

The power of the legislature to make the lien of taxes paramount to all other liens upon the land, so that when sale is made the purchaser takes title freed from encumbrance, is not questioned. "It is within the constitutional power of the legislature to enact that the purchaser at tax sales shall acquire a new, independent, and unencumbered title." (Black on Tax Titles, sec. 231.) "It is not only competent," says Judge Cooley, "for the state thus to charge the land with the tax, but the legislature may, if it shall deem it proper or necessary to do so, make the lien a first claim on the property, with precedence of all other claims and liens whatsoever, whether created by judgment, mortgage, execution, or otherwise, and whether arising before or after the assessment of the tax." (Cooley on Taxation, 445.)

Whether or not this state has done so is to be determined by its enactments.

Article XIII, section 4, of the constitution provides that, "for purposes of assessment and taxation," a mortgage shall be deemed and treated as an interest in the property affected thereby.

Section 3716 of the Political Code, treating of revenue and defining the term "real estate," declares that a mortgage, when land is pledged for the payment and discharge thereof, shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the land so pledged.

Upon these provisions the respondent bases an argument which may be thus stated: The constitution and revenue laws recognize and treat a mortgage as "real estate." In any piece of land subject to a mortgage there are two separate and distinct real properties. The one is the property of the owner of the fee, which is in value the difference between the mortgage debt and the value of the land if unencumbered; the second is the real property of the mortgagee. As a tax lien can only attach to the property of the person liable for the payment thereof, delinquent taxes

which become a lien upon land affected by mortgage become a lien only upon the *quantum* of property which the holder of the legal title has in the land. Therefore, the interest of the mortgagee is not affected by this lien, and, consequently, the lien of a pre-existing mortgage is not postponed to the lien of taxes, which become a charge only upon the interest of the owner of the fee.

But in this an unwarranted construction is given to the language of the constitution—a construction not borne out by the remaining part of section 4, nor by the legislative enactments under it. The section itself speaks of the holder of the legal title as the owner of the property. As further appears by it, a mortgage is to be treated as an interest in the real property which it affects, only to the end that the mortgage tax itself may become a lien upon the land. If the constitution intended to segregate a piece of realty into such anomalous properties as counsel claim exist, and thus to make a mortgage real property and distinct from the land in which it is an interest, it would not have permitted that the mortgage tax should itself become a lien upon another's property, to wit, upon the property of the owner of the fee. No more was intended by the provision quoted than to provide, first, for a decreased assessment upon the realty by reason of the mortgage; next, for an assessment upon the mortgage; and, finally, that the state may have security for the payment of the mortgage tax, to make the mortgage an interest in the realty to the end that the latter may be made chargeable for the tax on the former. No injustice thus results, for if the owner of the property is obliged to pay the mortgage tax it becomes a payment upon the amount of his mortgage indebtedness.

It still remains to be considered, before leaving this branch of the case, whether the legislature of this state has, in the exercise of an unquestioned power, made the lien of its taxes paramount. As this matter, the power being conceded, depends for its determination entirely upon statutory enactment, adjudications in sister states will be of little value unless based upon identical laws.

Our Political Code provides: "Sec. 3717. Every tax due upon personal property is a lien upon the real property of the owner thereof from and after 12 o'clock M. of the first Monday in March in each year."

"Sec. 3716. Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof."

After further provisions for the sale of the real property for all such delinquent taxes, it is provided:

"Sec. 3788. The deed conveys to the grantee the absolute title to the land described therein . . . free of all encumbrances, except the lien for taxes which may have attached subsequent to the sale."

No distinction is made by these laws between the lien which exists upon the land for the tax on personalty and the lien which exists for the tax upon the land itself. "Every lien" created by this title remains until the taxes are paid or the property sold. The title which the purchaser gets under the enforcement of any tax lien by sale is free from all encumbrances. "A lien for taxes does not stand upon the footing of an ordinary encumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the *res* without regard to identical ownership, and when it is enforced by sale pursuant to statute the purchaser takes a valid and unimpeachable title." (*Osterberg v. Union Trust Co.*, 93 U. S. 424.) The mandate of our statutes puts all tax liens upon the same plane; makes them all paramount to other liens, and under sale for their enforcement gives to the purchaser a title free and unencumbered.

In every case to which our attention has been directed, where the courts have made a distinction between the lien of the personal property tax upon the realty and that assessed upon the land itself, the decisions have been based upon a distinction between the two kinds of liens made by the statutes and recognized by the courts. This is true in *Bibbins v. Clark*, 90 Iowa, 230. The Iowa code declared in the case of a personal property tax merely that it should be a lien upon any land of the owner of the personal property, while in the case of the tax upon the land itself it declared that such tax should be "a perpetual lien against all persons except the United States and

this state." Commenting upon the fact that the provisions in the two cases were not the same, and that the difference must have been for a reason, the supreme court held that the land tax was a paramount lien, but that the tax upon personalty resulted in a lien upon the land subordinate to pre-existing encumbrances. This case will serve as an illustration of several of its kind. But it is obvious that they have no weight in this consideration when the laws of our state put all tax liens upon an equality, and make each and all superior to any other charge upon the land.

No doubt can be entertained but that this is the true and only reasonable interpretation of the effect of our code provisions.

It is held in *Eaton's Appeal*, 83 Pa. St. 152, that a statute which declares that a tax shall continue a lien "until fully paid and discharged," *ex proprio vigore* makes the lien superior to that of a judgment obtained before the tax is levied. In this state we not only have language of similar import in section 2716 of the Political Code, but that language is aided so as to remove the need of interpretation by section 3788, which provides that the deed conveys the absolute title free from all encumbrances.

2. It is further claimed by respondents that, by reason of non-compliance with section 3764 of the Political Code, the sale of the land was void at least to the extent that it did not operate as a sale for the amount of the personal property tax, and that plaintiff, as redemptioner, is not bound to redeem in the amount of the tax. The delinquent list as prepared and published contained descriptions of several distinct parcels of real estate assessed to the Otay Watch Company as owner—the value of the parcels set opposite their descriptions, and also the amount of the taxes, percentage, and costs—all as contemplated by the code. Following these matters was the statement: "Personal property, valuation, \$6,200; taxes, \$147.81."

Section 3764 of the Political Code declares that the list "must contain the names of the persons and the description of the property delinquent, and the amount of taxes and costs due, opposite each name and description, with the taxes due on personal property added to taxes on real estate, where the real estate is liable therefor, or the several taxes are due from the same person."

The contention is that there was no addition of the personal

tax as contemplated by the law. But the word "added" as here used does not contemplate a mathematical computation. It is employed in the sense of subjoined or appended, and the method employed in this delinquent list is a full compliance with the letter and purpose of the statute. There is set forth the amount of the delinquent personal property tax and the parcels of land upon which it becomes a lien by operation of law, as well as the amount of the tax levied directly upon each of those parcels.

3. The final contention of respondent is, that the sale is void because made after the tax collector's right to sell had ceased. This contention is based upon a statutory defect which arose when the legislature departed from the former scheme of single collections and provided for the payment of taxes in installments. In so doing, in 1891 (Stats. 1891, p. 438), it amended section 3797 of the Political Code, and required the tax collector to make his final report and turn over his delinquent list to the auditor upon the third Monday of June in each year. By section 3800 of the Political Code as amended, the tax collector is required to make affidavit, indorsed upon the delinquent list, that the taxes not marked paid have not been paid, and that he has not been able to discover any property belonging to or in possession of the persons liable to pay the same, whereof to collect them.

But by section 3764 of the Political Code, as amended, the delinquent list must be published "on or within five days before or after the first Monday in June," and by section 3768, left unamended, the sale must not be less than twenty-one nor more than twenty-eight days from the first publication.

A consideration of these provisions shows that a strict compliance with them might, and in some cases would, necessitate a final return of the lists by the tax collector before the day of sale had arrived. Thus the tax collector would be compelled to make a false and stultifying affidavit that he could not collect delinquent taxes, and knew of no property from which he could collect them, before the day had arrived when, under the statute, he was to sell designated lands for that very purpose. Such was the result in the year 1892 when this land was sold. The tax collector, acting under the belief that the duty to sell was paramount to the duty to report upon the day named, made his sale and reported after the day designated by the statute.

In this his judgment was sound and his acts legal. As the tax sale could not be made until after the third Monday in June, the day upon which the tax collector was to make his affidavit and report to the auditor, it is obvious that this date is either a legislative oversight or a clerical error. For a literal interpretation leads to manifest absurdity, and would involve a declaration that the legislature demanded of a public officer the making of an affidavit whose statements would be at variance with the facts and flagrantly false. To avoid a construction so clearly against reason and right, and to give effect to the plain intent of the legislature as deduced from the revenue act as a whole, it will be concluded, either that the date fixed for the tax collector's settlement with the auditor is directory, and that the settlement may be had at some reasonable time after the sale, or, as is probably the fact, that by clerical misprision the word "June" was inserted for the word "July," which latter would remove all difficulty and make the clashing provisions harmonious.

In doing this no violence is worked to the rules of statutory construction, so long as the interpretation arrived at is the one which the legislature must have intended. For, as is said by Endlich (Endlich on Interpretation of Statutes, sec. 295): "Where the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This is done sometimes by giving an unusual meaning to particular words; sometimes by altering their collocation; or by rejecting them altogether; or by interpolating other words; under the influence no doubt of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true intention." These rules embrace also the correction of clerical errors by the insertion of the true word or words. (*County of Lancaster v. Frey*, 128 Pa. St. 593.)

It follows, therefore, that appellants' demurrer was improperly overruled, and that the judgment should be reversed, with directions to the trial court to sustain the same, and it is so ordered.

Harrison, J., Van Fleet, J., Garoutte, J., and Temple, J., concurred.

[S. F. No. 922. Department One.—October 8, 1897.]

HIBERNIA SAVINGS AND LOAN SOCIETY, Respondent,
v. ROSA BEHNKE, Executrix, etc., of Vitus Wackenreuder,
Deceased, Appellant.

APPEAL—DISMISSAL—FAILURE TO SERVE ADVERSE PARTY—PRACTICE.—The consideration of a motion to dismiss an appeal for the alleged failure to serve the notice of appeal upon one claiming to be an adverse party, will be continued until the hearing of the appeal, when the determination of the motion involves an examination of the entire record, and incidentally of the merits of the appeal, and the motion was not made until after the appellant had filed his points and authorities upon the appeal.

MOTION to dismiss an appeal from an order of the Superior Court of the City and County of San Francisco refusing to set aside a sale. William T. Wallace, Judge.

The facts are stated in the opinion of the court.

T. Z. Blakeman, for Appellant.

A. Tobin, and Thomas F. Barry, for Respondent.

THE COURT.—The appeal herein is taken from an order refusing to set aside a sale by the sheriff under a decree of foreclosure. The respondent has moved to dismiss the appeal for failure to serve the notice upon one claimed by it to be an adverse party. The motion was not made until after the appellant had filed his points and authorities upon the appeal, and the respondent has included the points in support of the motion with its points and authorities upon the appeal. The determination of the motion involves an examination of the entire record, and incidentally of the merits of the appeal, and ought not to be determined in advance of the hearing of the cause. The motion is, therefore, continued until the hearing upon the appeal.

[Sac. No. 309. Department One.—October 8, 1897.]

In the Matter of the Estate of LAVINA JONES, Deceased.
CADWALADER JONES, Appellant, v. MINNIE MAY
LAMONT et al., Respondents.

HUSBAND AND WIFE—AGREEMENT FOR SEPARATION—RELEASE OF RIGHT OF SUCCESSION.—An agreement for separation between a husband and wife, made in pursuance of a compromise of an action for a divorce, providing for a division of property between them, and containing a mutual release "from all obligations for the future acts and debts of each other," and an individual release each to the other from the then existing debts and obligations of each, but not containing a release, in terms, by either one, of claims upon the future acquisitions of the other, nor, in terms, any release by either one upon the estate of the other in case of death, does not amount to a waiver or release by either of the right to succeed to all or any portion of the other's estate.

ID.—ESTATE OF DECEASED PERSON—APPEARANCE OF ATTORNEY.—In a proceeding for a distribution of such a wife's estate, instituted by the husband, and on the appeal from the decree therein, the public administrator, as administrator of her estate, who made and had no claim upon the estate beyond his commissions, was not an adverse party, nor a necessary party to the appeal, and the attorney who appeared for him in the general proceedings of the administration had a right to appear as attorney for the husband in the proceeding for a distribution.

APPEAL from a judgment of the Superior Court of Sacramento County distributing the estate of a deceased person.
Matt F. Johnson, Judge.

The facts are stated in the opinion.

C. H. Oatman, for Appellant.

James O. Prewett, for Respondent.

CHIPMAN, C.—Appeal from decree of distribution. The controversy arises out of a certain contract of separation between deceased in her lifetime and her surviving husband, appellant. The court found that the husband had no interest in the wife's estate, she having died intestate. The court also found that shortly prior to May 29, 1884, the said deceased commenced an action against her said husband for divorce and division of the property; that a compromise was agreed to on said day last named, pursuant to which the agreement in question was entered into

and the suit for divorce and division of the property was dismissed; whereupon the parties separated, and so continued, holding no communication as husband and wife until her death, November 3, 1895. The appeal is on the judgment-roll presented by bill of exceptions.

The sole question presented by appellant is, "whether or not the separation agreement in question amounts to a waiver or release by appellant of his right to succeed to all or any portion of his wife's estate."

The agreement is as follows:

"This agreement, made the 29th day of May, 1884, between Cadwalader Jones, of Sutter county, California, the party of the first part, and Lavina Jones, his wife, of the same place, the party of the second part, witnesseth, that whereas differences have arisen between said parties, and they have agreed to live separate and apart from each other,

"Therefore it is agreed by said first party that said second party shall receive from the sale of the homestead of the parties hereto the sum of \$2,850, and one-half of the net proceeds of all the personal property belonging to said parties, and one bay mare named Kittie, and that said second party shall be released from every and all obligations of every kind and character, and shall not be held liable for any of the debts of said first party.

"In consideration whereof, said second party agrees that she accepts in release and full payment from said first party the foregoing sum of money, for any and every demand, claim, obligation, debt, and liability, and does by these presents agree to release him, said first party, from all and any debt which she may now owe, or which may hereafter be contracted by her.

"And it is expressly understood and agreed by both parties hereto that each party is hereby released and absolved from all obligations and liability for the future acts and debts of each other, and that said first party shall retain and have one bay filly, Daisy, and that the remainder of said personal property shall be sold at auction within three weeks from this date, and that on the day of the sale the auctioneer shall divide the net proceeds of such sale equally between said first and second parties."

The agreement seems to be an attempt to make an equal division of the property, including the homestead. There is a mutual release "from all obligations and liability for the future acts and debts of each other"; there is also an individual release each to the other from the then existing debts and obligations of each. There is no release in terms, by either one, of claims upon the future acquisitions of the other, nor, in terms, any release by either one upon the estate of the other in case of death. In *In re Davis*, 106 Cal. 453, the agreement read that the wife "does relinquish and surrender forever all claims of any nature she may now or hereafter have against any property that said W. W. Davis may now have or may hereafter in any manner acquire." And it was held that "the wife contracted away her inheritable interest in her husband's property." Here were apt words importing an intention never to assert in any way any right to the property of the husband, present or future. No such intention can be derived from the language of the contract before us on the part of either one of the parties to it. It is urged that this intention may be found in the situation of the parties at the time; that a divorce suit was pending, in which a division of the property was asked, and that the contract was the result of a compromise of that suit; that the divorce, if granted, might have given the wife all the property conveyed by the contract, free from all claim of the husband. While the law permits divorce, and also permits separation under articles affecting the property, it does not encourage the one more than the other, nor, in fact, either. We cannot see that the dismissal of the divorce suit affected the contractual relations of the parties to the contract subsequently entered into. They may, upon reflection, both have regarded that proceeding as a mistake and ill advised, and without adequate cause; the contract is sufficiently clear to speak for itself; the divorce proceeding is not referred to in the contract, and even the existence of unhappy differences therein referred to was not essential to its validity. (Civ. Code, sec. 159.) The contract in nowise affected the marriage *status*; the parties remained husband and wife. The utmost that the law permits is that they may agree to live apart, and may make a valid contract as to their property, but this may be terminated

at any moment by reconciliation which "would avoid the contract—as to all features, at least, remaining executory." (*Sargent v. Sargent*, 106 Cal. 541.) We do not think the courts should come to the aid of these contracts so as to deprive either the husband or wife of the property rights growing out of the married relation, except where there is a clear and unmistakable intention to barter away such rights. Even where "unhappy differences" exist, it is quite consistent with the separation to so divide the property that in the event of death the statute of succession and descents shall control its devolution. That there was an intention in this case to defeat the law of inheritance, or to waive its beneficial provisions, we do not think can be ascertained from anything in the contract, or from any extrinsic facts before us.

If this contract is to be construed as an equitable assignment of the husband's interest in the wife's estate, it falls short of accomplishing this object. To effect such result, "there must be on the face of the instrument expressly, or collected from its provisions by necessary implication, language of present transfer applying directly to the future as well as the existing property, or else language importing a present contract or agreement between the parties to sell or assign the future property." (3 Pomeroy's Equity Jurisprudence, sec. 1290.)

We have examined the cases relied upon by respondents. They are *Labbe v. Abat*, 2 La. 553; 22 Am. Dec. 151; *Bratton v. Massey*, 15 S. C. 277; *Dillinger's Appeal*, 35 Pa. St. 357; *Hitner's Appeal*, 54 Pa. St. 110; *Wallace v. Bassett*, 41 Barb. 92; *Rains v. Wheeler*, 76 Tex. 390; *Scott's Estate*, 147 Pa. St. 102. We do not feel called upon to point out wherein the essential features of these cases, and the contracts under which they arose, are divergent from the case before us. Suffice to say that they are plainly distinguishable from this case. They apply to cases such as *In re Davis*, *supra*, and to other cases cited from our own reports in the well-considered opinion of Mr. Justice Van Fleet filed in the Davis matter. But, rightly interpreted, they only emphasize the importance of holding strictly to the views we have endeavored to briefly present. In *Scott's Estate*, *supra*, most relied upon by respondents, the language is, "forever discharge the said John Scott, his executors, administrators, etc., from all lia-

bility to said Olivia R. Scott other than that assumed by him in this contract; and they also release, acquit, and discharge the said John Scott from all duties, liabilities, and obligations of every kind whatsoever, which otherwise she, the said Olivia, might or could claim under or by virtue of the marriage relation between her and the said John Scott." Here were apt words to show an intention to exclude Mrs. Scott from sharing in the distribution of the husband's estate, and to release her inheritable interest therein. But there is no approach to equivalent provisions in the contract involved in this controversy.

2. In their reply brief respondents raise the question that the attorney for appellant, Mr. C. H. Oatman, had no right to act as such, for the reason that he was previously, and is still, the attorney for the administrator.

We do not think the public administrator, making or having no claim upon the estate beyond his commissions, and not having filed the petition for distribution nor taken part at its hearing, was an adverse party within the meaning of this section. (*Senter v. De Bernal*, 38 Cal. 637.) Neither was he a necessary party to the appeal. It has been several times held that he cannot appeal from an order of distribution. (*Bates v. Ryberg*, 40 Cal. 463; *Estate of Wright*, 49 Cal. 550; *Estate of Marrey*, 65 Cal. 287.) He is not "an aggrieved party" who has the right of appeal under section 938 of the Code of Civil Procedure. (*Goldtree v. Thompson*, 83 Cal. 420.) He is there spoken of as an indifferent person between the real parties in interest. (See, also, *Estate of Welch*, 106 Cal. 427.) As to the relation of the administrator to the estate see *Roach v. Coffey*, 73 Cal. 281, and *Rosenberg v. Frank*, 58 Cal. 420. The reasons given why an administrator may not appeal from a decree of distribution are equally persuasive against his right to be heard, either voluntarily or involuntarily, as respondent, and also as to his being a necessary party to the appeal.

Whether an attorney, who is attorney for an administrator, may act for one of the heirs as against other heirs, in an adversary proceeding relating to the property of the estate, is a question which would depend upon the circumstances of the particular case. We can conceive of situations where it might be improper—for example, where the administrator is an heir at law—but in the case here no disqualifying relation is shown between

attorney and client. Furthermore, it does not appear that the administrator took any part or appeared by attorney or otherwise in the proceedings for distribution, and at that hearing no objection was made to Mr. Oatman's appearance in any capacity.

The judgment should be reversed.

Britt, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed.

Harrison, J., Van Fleet, J., Garoutte, J.

[S. F. No. 901. Department One.—October 8, 1897.]

ELLA M. PHELAN, as Executrix, etc., Appellant, v. GILBERT
L. ANDERSON, Respondent.

LANDLORD AND TENANT—PAROL LEASE FOR YEARS—AGRICULTURAL LAND—ANNUAL RENT—TENANCY FROM YEAR TO YEAR.—A parol lease for five years is void, and no rights are fixed by its terms; but, when entry is made under it, the tenancy is either at will, or from month to month, or from year to year, according to the circumstances of the case; and where the land is agricultural, and the rent is to be paid annually, and is in fact paid to the lessor and accepted by him as annual rent, the holding is from year to year.

ID.—EJECTMENT—PREMATURE ACTION BY LESSOR—RECEIPT OF ANNUAL RENT—CONFLICTING EVIDENCE—APPEAL.—An action of ejectment will not lie in favor of a lessor who has received annual rent under a void parol lease, before the expiration of the year for which the rent was received; and where the evidence upon the question of the receipt of rent for that year is conflicting, and the verdict was against the plaintiff, the finding of the jury as to that fact is controlling upon appeal.

ID.—ACTION BY EXECUTRIX—POWER TO RENT PREMISES—RECEIPT OF RENT—ESTOPPEL.—An executrix who has received annual rent from a tenant from year to year, who entered into possession of premises belonging to the estate of the decedent under a parol lease from the executor, cannot maintain an action of ejectment to oust the tenant before the expiration of a year for which annual rent was received, upon the alleged ground that the executrix had no power to lease the premises without the consent of the court in which the administration was pending.

ID.—EVIDENCE—COMPLAINT IN ANOTHER ACTION—ALLEGATION OF INDIVIDUAL OWNERSHIP—HARMLESS RULING.—The admission in evidence in an action of ejectment brought by an executrix, of a complaint filed in another action, averring individual ownership in the same plaintiff, conceding it to be erroneous, is not prejudicial, where it is conceded

upon both sides that the administration is not concluded, and that no distribution has been had, and all other statements in such pleading were in support of the testimony of the executrix.

12.—CHANGE IN AMOUNT OF ANNUAL RENT—NUMBER OF LEASES—QUESTION OF FACT—PREJUDICIAL INSTRUCTION.—Where there was evidence for the plaintiff tending to show that the amount of annual rent specified in the original parol lease was changed and increased by consent of the parties for the ensuing years, and that the defendant was in partial default of rent for the year in which the action was brought, it was a question of fact essential for the jury to determine as to the number and character of the leases entered into between the parties, and an instruction that the only lease established was the original parol lease for years, under which the defendant entered into possession, at a specified annual rental, is prejudicially erroneous, as touching upon a matter of fact, and taking from the jury the evidence for the plaintiff as to the change in the terms of rental.

APPEAL from a judgment of the Superior Court of Santa Cruz County and from an order denying a new trial. J. H. Logan, Judge.

The facts are stated in the opinion of the court.

Charles B. Younger, and Holbrook & Maher, for Appellant.

Lindsay & Cassin, for Respondent.

GAROUTTE, J.—This is an action of ejectment, brought by the executrix in the interest of the estate of Martin Phelan, deceased. An appeal is prosecuted from the judgment and order denying plaintiff's motion for a new trial. The case was tried by a jury. Title is admitted in plaintiff, and defendant claims a right of possession under a lease. There are various controverted facts disclosed by the record, but, in view of the verdict of the jury, we are bound to assume those facts in favor of defendant. Defendant's evidence was to the effect that upon November 1, 1891, plaintiff, by oral agreement, leased to him the land in dispute for the term of five years, at the yearly rental of six hundred dollars; that under such agreement he entered into possession of the land, and before the bringing of this action had fully paid to plaintiff the rent for the aforesaid five years. This action was begun in March, 1896.

The parol lease for five years under which defendant entered was void, and no rights were fixed by it, but, when an entry is

made under such a lease, all the authorities agree that the tenant holds either by tenancy at will or from month to month or from year to year. If the land is agricultural land and the rent is to be paid annually and in fact is paid to the lessor and accepted by him as annual rent, then beyond doubt the conclusion may well be declared by judge or jury that the holding is one from year to year. (See *Coudert v. Cohn*, 118 N. Y. 309; 16 Am. St. Rep. 761; *Talamo v. Spitzmiller*, 120 N. Y. 37; 17 Am. St. Rep. 607; *Rosenblat v. Perkins*, 18 Or. 156.) In the present case it is claimed by defendant that prior to November 1, 1895, he paid to plaintiff the six hundred dollars due for the year ending November 1, 1896. If the lessor received the rent for that year from the lessee, then the holding of the lessee for that time could not be disturbed, and the plaintiff had no right of action when this litigation was inaugurated. The evidence upon this question was directly conflicting, and the verdict of the jury as to the fact must be held controlling by this court.

It is insisted by appellant that she had no power to rent the premises without the consent of the court in which the administration was pending, and that for such reason her lessee was not entitled to possession. We are not prepared to hold that an executor may receive the rent from the lessee upon a lease from year to year, the lessee enter into possession under the lease, and thereafter the lessor oust the lessee from such possession for the reason urged. If it be conceded that the court should have refused to admit in evidence the statements contained in a pleading of plaintiff filed in another action, still we find no error prejudicial to plaintiff in such ruling. That pleading contained the statement that she, plaintiff, was the owner of this land in her own right, while it is now conceded upon both sides that the administration has not yet been finally concluded and distribution had. All other statements contained in the pleading offered tend to bear out plaintiff's testimony given at the present trial, rather than contradict it.

Plaintiff testified that she rented the premises to the defendant for the year 1891-92 for the sum of six hundred dollars, but that prior to the expiration of the year defendant offered her one thousand dollars for the next year, and that he paid her one thousand

dollars a year for the years 1892-93, 1893-94, and partially paid her at the same rate for the year 1894-95. Evidence of other parties is disclosed tending to show that he was paying rent during these years at the rate of one thousand dollars per annum. This evidence all indicated a different contract of letting from the one relied upon by defendant; and, if there was another and subsequent lease, as might be inferred by the jury from the foregoing evidence, the defendant was in partial default in the payment of his rent for the year 1894-95. In view of this phase of the case error was committed in the law given to the jury, wherein the court said: "The only lease established here is the verbal lease by virtue of which the defendant entered on the premises in 1891 at an annual rental of six hundred dollars." By this instruction all the evidence of plaintiff and her witnesses to which we have made reference was taken from the jury, and the error is most prejudicial. If the lessee paid rent during these years at the rate of one thousand dollars per annum, it is certainly some evidence that he was holding under a lease calling for such rent. The court was touching upon matters of fact when it informed the jury there was but one lease, and this it had no right to do. It was a question of fact essential for the jury to determine as to the number and character of leases these parties had entered into during these years. If defendant, during the years 1892, 1893, and 1894, was holding under a lease calling for an annual rent of one thousand dollars, then his legal status as to plaintiff when this action was brought would be entirely different from that fixed by this instruction of the court. For this reason the error was clearly prejudicial. ✓

The evidence of defendant shows that he paid no rent subsequent to November 1, 1895, and if the rent for the year 1895-96 was paid by him to plaintiff it was paid prior to that time. Before November 1, 1895, plaintiff served written notice upon defendant terminating his tenancy upon that date. The court instructed the jury upon this question of notice, but upon this point we only find it necessary to say that if the facts and circumstances of the holding of defendant demanded a notice in order that the tenancy might be terminated, then this notice served that purpose. If no notice was necessary to terminate the tenancy, then no harm was done by the service of it. There are many techni-

cal objections made to the admissibility of evidence, but, a new trial being ordered, they will probably not arise a second time.

For the foregoing reasons the judgment and order are reversed.

Van Fleet, J., and Harrison, J., concurred.

[Crim. No. 270. Department Two.—October 8, 1897.]

THE PEOPLE, Respondent, v. ARTHUR ASHMEAD et al.,
Appellants.

CRIMINAL LAW—BURGLARY—EVIDENCE—STATEMENTS SHOWING INNOCENCE.—On a trial for burglary, after evidence has been offered showing that, on the night of the burglary, the defendants were arrested with the property stolen in their possession, statements then made by them to the arresting officer, relating to their movements on the night in question, and to the goods in their possession, which if true, tended to show their innocence, are admissible without preliminary proof that such statements were freely and voluntarily made.

ID.—BREACH OF PAROLE.—Evidence is further admissible that on account of such statements the arresting officer then released the defendants upon their promise to return the next morning, the goods being left in his custody, but that they did not return then or at all, and that they were rearrested, after considerable search, several days later.

ID.—CHANGES IN INSTRUCTIONS ASKED.—In such a case, changes made in instructions requested by the defendants that guilt must be proven "beyond all reasonable doubt," by inserting the word "a" in the place of "all," and that "possession of stolen property . . . is not sufficient to warrant a conviction," by inserting the word "mere" before the word "possession," are immaterial and without prejudice to the defendants.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. B. N. Smith, Judge.

The facts are stated in the opinion.

Blakely & Barber, for Appellants.

W. F. Fitzgerald, Attorney General, and W. H. Anderson, Assistant Attorney General, for Respondent.

BRITT, C.—Defendants were convicted of the crime of burglary. At the trial there was evidence that on the night of October 30, 1896, a building, the property of one Douglas, was entered

and certain farm produce belonging to Douglas was stolen therefrom; on the same night defendants were arrested and had then in their possession—in a wagon driven by them—the produce aforesaid with other property of perishable character; at this time they made certain explanations to the arresting officer relating to their movements on the night in question and relating to the said goods in their possession; these statements, if true, tended to show the innocence of defendants; the court admitted testimony of the declarations thus made to the officer, and it is argued now that the same was incompetent because not preceded by proof that such statements were freely and voluntarily made. The objection is groundless; the declarations were not confessions of guilt; whatever inculpatory force they had arose, not from their intrinsic effect, but from the comparison of them with other facts appearing in the case. (*People v. Hickman*, 113 Cal. 80.)

Defendants told the officer who arrested them that they had purchased the goods found in their possession and could prove their assertion, and besought him not to take them to jail; their protestations so far prevailed that he allowed them to go their way—the goods and their wagon and horse being left in his custody—upon their promise to return in the early morning; they did not return then or at all, but were rearrested by the officer, after considerable search, several days later. Defendants urge that evidence of the breach of their parole was improperly allowed by the court. Even if their conduct was not the equivalent of flight from arrest, as defendants argue, still their failure to keep faith with the officer, coupled as it was with abandonment of the property, which they claimed to own, in his hands, was a circumstance manifestly proper to be considered by the jury, who might regard it as evincing a consciousness of guilt and as illustrative of the nature of defendants' claim to the property.

The objections taken upon the failure of the court to give to the jury certain instructions in the precise form requested by defendants have little force. Thus an instruction was asked to the effect that a conviction could not lawfully be had on mere probabilities, but that guilt must be proven "beyond all reasonable doubt"; the court inserted the word "a" in the place of "all,"

and gave the charge with this substitution. The change was merely verbal, and could not have been prejudicial to defendants. So the following instruction was asked: "I instruct you that the possession of stolen property, however soon after the theft, is not sufficient to warrant a conviction for burglary." The charge was given with the insertion of the word "mere" before the word "possession." Considered abstractly, the charge, both as given and as requested, was but a truism; and, so far as it could have application to the facts of the case, its point was expressed much more helpfully to the jury in a subsequent instruction that defendants must be acquitted unless it was proved that they entered the house described in the information for the purpose of committing larceny therein, "and the fact that they had possession of said property soon after the alleged burglary, standing alone, will not justify you in finding" that they entered the building for that purpose. The judgment and order appealed from should be affirmed.

Searls, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Henshaw, J., Temple, J., McFarland, J.

[S. F. No. 723. Department Two.—October 8, 1897.]

ADOLPH MAYER, Appellant, v. HENRY MAYER et al., Respondents.

PARTITION—CONVEYANCE TO DEFENDANT PENDENTE LITE—FINDING.—In an action for partition, in which the evidence showed that one of the defendants, *pendente lite*, had acquired all the title of the plaintiff in the land sought to be divided, a finding that the plaintiff had no right or interest in the premises is a finding of the ultimate fact proved by the deed from him, and is sufficient to sustain a judgment dismissing the action.

ID.—FINDING AGAINST FRAUD OR UNDUE INFLUENCE—EVIDENCE.—A specific finding that such deed was not procured by fraud or undue influence is not necessary, where no evidence tending to show such facts was offered by the plaintiff.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

T. Z. Blakeman, for Appellant.

Knight & Heggerty, George D. Collins, Walter S. Hinkle, and W. S. Goodfellow, for Respondents.

TEMPLE, J.—This is an action for partition of certain land in San Francisco. Since the action was commenced, the defendant Henry Mayer has acquired all the right and title of the plaintiff in the premises sought to be divided. Upon this matter the evidence is not conflicting. The court found that plaintiff is not the owner of any interest in the property, and dismissed the action, and the plaintiff appeals.

The only point in the appeal requiring notice is the contention that there is no finding as to the affirmative defense as above indicated; and, further, that the law gave plaintiff a replication, to the effect that the deed was procured by fraud and undue influence, and there is no finding upon such potential issues.

No new issue was raised by pleading the conveyance from the plaintiff, and the only occasion for specially pleading it arose from the fact that it is new matter occurring after the commencement of the action.

The finding that plaintiff has no right or interest in the premises is a finding of the ultimate fact proven by the deed.

Plaintiff put in no evidence tending to show fraud or undue influence, therefore no findings were required upon these possible issues. The law gives plaintiff the benefit of all possible replications if he wishes to avail himself of them. If he does not avail himself of the privilege they are waived, and neither the court nor the defendant need concern themselves about them.

The judgment is affirmed.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 636. Department Two.—October 8, 1897.]

JOHN MALONE, Respondent, v. GEORGE G. ROY, Appellant.

MORTGAGE—FORECLOSURE—MORTGAGEE IN POSSESSION—AVERMENT OF RENTAL VALUE—EVIDENCE.—In an action to foreclose a mortgage, by a mortgagee who had been in possession of the mortgaged premises, an averment in his complaint "that the rents and profits of the said premises for the time plaintiff has had and received the same does not exceed three hundred dollars for the first year, four hundred and fifty dollars for the second year, and five hundred dollars per annum for the remaining portion of the time which plaintiff possessed the same," is an admission that the rental value for the second year was four hundred and fifty dollars, and for the balance of said time five hundred dollars per annum; and it is error for the court, on the trial, to permit the plaintiff to introduce evidence showing a less rental value during such time; and a judgment based on a finding of a less rental value for such period will be modified on appeal to conform to the pleading.

Id.—FINDING.—The rental value of the premises for times not covered by such averment is not concluded thereby, and, where the evidence as to the value is conflicting, the finding thereon will not be disturbed.

APPEAL from a judgment of the Superior Court of Del Norte County and from an order denying a new trial. J. E. Murphy, Judge.

The facts are stated in the opinion of the court.

A. J. Bledsoe, and Denson & De Haven, for Appellant.

L. F. Cooper, and Haven & Haven, for Respondent.

McFARLAND, J.—This is an action to foreclose a mortgage upon certain lands executed by defendant to the plaintiff. The plaintiff in his complaint admits that he has been in possession of the mortgaged premises from about the fourth day of January, 1888, to the commencement of the suit on June 27, 1892, and admits that he is accountable to the defendant for the rents and profits of the mortgaged premises during that time. Judgment was rendered for plaintiff foreclosing the mortgage for a certain amount of money found to be due from defendant to plaintiff thereon, after an accounting in which plaintiff is charged with a certain amount as the rental value of the premises while in the plaintiff's possession, and also with another certain amount of money for the value of certain timber growing upon the premises which had been sold by the plaintiff during his occupancy. De-

defendant appeals from the judgment and from an order denying his motion for a new trial.

There are two main points made on the appeal, involving the correctness of the finding of the court as to the rental value and as to the value of the timber sold—the appellant insisting that the amounts found by the court as to said two items were too small.

The great mass of the evidence in the case was directed to the value of the said timber. The court found the value to be five hundred dollars, and the appellant claims that it should have been seven hundred and forty-two dollars. We do not deem it necessary to here discuss the testimony upon that point in detail; it is sufficient to say that the finding of the court as to the value of the timber is sufficiently supported by the evidence to put it beyond disturbance by this court.

As to the rental value, the averment of the complaint is as follows: "That the rents and profits of the said premises for the time plaintiff has had and received the same does not exceed three hundred dollars for the first year, four hundred and fifty dollars for the second year, and five hundred dollars per annum for the remaining portion of the time which plaintiff has possessed the same." The defendant in his answer denies that the rents and profits do not exceed the amounts named in the complaint, and avers that the rental value of the land was and is fifteen hundred dollars a year. The case was pending for a number of years, during which time plaintiff remained in possession, and in a supplemental answer defendant avers that since the commencement of the suit the rental value was and is the sum of nine hundred dollars per year. The court found that the rental value during the first year of plaintiff's occupancy was three hundred and sixty dollars; that for the second year such value was also three hundred and sixty dollars, and for the balance of the time down to the commencement of the action at the rate of three hundred dollars a year. There was a great deal of conflicting evidence as to this rental value for these years; and we could not say that the findings of the court upon the subject were not sustained by the evidence. But the complaint clearly admits that the rental value for the second year was four hundred and fifty dollars, and for

the balance of said time five hundred dollars per annum. At the trial appellant objected to any evidence by respondent to the point that the rental value for those years was less than the amount named in the complaint, and moved to strike all such testimony out; the court, however, overruled the objection, and this ruling was erroneous. The plaintiff was bound by the averments of his complaint in this regard, and should not have been allowed to introduce evidence contradicting them. (*Hendy Machine Works v. Pacific etc. Co.*, 99 Cal. 421; *Johnson v. Visher*, 96 Cal. 310.) These admissions, however, only covered the time between the commencement of plaintiff's occupancy and the filing of the complaint; the findings of the court as to the rental value after that time were warranted by the evidence and are not embarrassed by the admissions in the complaint.

We do not see any other points made by appellant which are necessary to be considered.

The error committed by not considering the averments of the complaint as above stated does not, we think, necessitate a reversal of the judgment or a new trial. The judgment and findings in other respects are free from error. The finding of the court as to the rental value of the land during the second and third years of plaintiff's occupancy and down to the filing of the complaint is substantially a finding that the rental value did not exceed the amount admitted in the complaint, and for the purposes of the case may be so considered, and the judgment may be accordingly modified.

The order denying a new trial is affirmed. It is further ordered that the cause be remanded, with directions to the court below to modify the judgment by deducting from the amount found due plaintiff the difference between the rental value of the mortgaged premises during the second year of plaintiff's occupancy and down to the commencement of the action, and the amount admitted by the complaint to be the rental value during said period, to wit, four hundred and fifty dollars per annum for the second year, and five hundred dollars per annum for the balance of such time, interest to be calculated accordingly. And as thus modified the judgment will stand affirmed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 666. Department Two.—October 8, 1897.]

C. H. LEADBETTER et al., Appellants, v. FRED. W. LAKE
et al., Respondents.

APPEAL—JUDGMENT—FINDINGS—PRESUMPTION OF WAIVER.—On an appeal from the judgment on the judgment-roll alone, all intendments are in its favor, and error must be affirmatively shown; and where the record is silent upon the subject, a waiver of findings will be presumed, and, if not waived, the fact must affirmatively appear by a bill of exceptions.

ID.—JURY TRIAL—PRESUMPTION OF WAIVER.—Where the judgment recites that the cause was regularly heard before the court sitting without a jury, and it nowhere appears in the record that the appellant demanded a jury, the presumption is that a jury was waived.

ID.—COSTS—DEFENDANTS JOINTLY SUED.—A joint judgment for costs in favor of defendants who were jointly sued, but who separately answered, is proper.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Hillyer & Jacobs, for Appellants.

F. D. Brandon, and Cobb & Loeffler, for Respondents.

McFARLAND, J.—Judgment went in the court below for defendants. Plaintiffs appeal from the judgment, bringing up only the judgment-roll, which consists of the pleadings and the judgment. The appellants ask for a reversal upon the ground that there were no findings, and that findings were not waived. But all intendments are in support of a judgment, and he who expects to reverse it must affirmatively show error. It has been established by a long line of decisions of this court that where the record is silent upon the subject a waiver of findings will be presumed. The fact that findings were not waived must affirmatively appear by a bill of exceptions, unless the judgment-roll shows it. (*In re Arguello*, 85 Cal. 151, and cases there cited on page 153.)

Appellants also claim a reversal upon the ground that there was no jury trial, and that a jury was not waived. The judgment shows that the cause "came on regularly to be heard before the court sitting without a jury," and it nowhere appears that the

plaintiff demanded a jury; and in such a case the presumption is that a jury was waived. In *Montgomery v. Sayre*, 91 Cal. 211, this court say: "If the question were, did the defendant waive his right to a trial by jury—the record being silent upon the question and the cause having been tried and determined by the court—there would be no difficulty, for the authorities are explicit to the end that such would be the presumption. (*Boston Tunnel Co. v. McKenzie*, 67 Cal. 490." See, also, *Smith v. Brannan*, 13 Cal. 115, 116.)

Appellants also claim a reversal because there was a joint judgment in favor of respondents for costs, while although sued jointly they answered separately—the contention of appellants being that there should have been a separate judgment in favor of each respondent for his costs. But in such case there is no error in entering a joint judgment in favor of defendants. (*Myers v. Moulton*, 71 Cal 503.)

The judgment appealed from is affirmed.

Temple, J., and Henshaw, J., concurred.

[Crim. No. 224. Department One.—October 9, 1897.]

THE PEOPLE, Respondent, v. CLIFTON E. MAYNE, Appellant.

CRIMINAL LAW—RAPE—EVIDENCE—DATE OF BIRTH OF FEMALE CHILD—TESTIMONY OF MOTHER—ENTRY IN BIBLE NOT ADMISSIBLE—HEARSAY.—Upon the trial of a defendant accused of rape in having had sexual intercourse with a female child under the age of fourteen years, where the mother of the girl is in court, and has testified to her age, an entry made by the mother in a Bible of the date of the girl's birth is not admissible as substantive evidence of that fact. Such testimony is, in its nature, hearsay evidence, and subject to the general rule by which that class of evidence is governed, viz., that the fact sought to be established cannot be otherwise shown, and is incompetent to establish any fact which is susceptible of being proved by witnesses who speak from their own knowledge.

ID.—PEDIGREE NOT INVOLVED.—Although the age of the female child was involved in the issue to be tried, that fact did not constitute it a case of pedigree in which her age could be proved by the written declaration of a third person.

ID.—EVIDENCE IN CASE OF PEDIGREE.—In cases of pedigree it must be shown that the person who made the entry is dead before the evidence will be admissible.

ID.—ALTERATION IN ENTRY—PROVINCE OF COURT—DISCRETION—APPEAL.—

Whether there has been a material alteration in an entry made in a family Bible is a question to be determined by the court when it is offered, and before it is presented to the jury; and, where such entry is admitted, it must be assumed upon appeal that the court was satisfied that no material change had been made in the entry, in the absence of any showing to the contrary, and, its action being matter of discretion, its ruling upon the question of alteration is not open to review, unless it is made to appear that its discretion was abused.

ID.—ORDER REFUSING TO HEAR MOTION TO SET ASIDE ORDER DENYING NEW TRIAL—JURISDICTION—APPEAL—DISMISSAL.—

After appeal from an order denying a new trial, the subject matter of that order is removed from the jurisdiction of the superior court, and, while such appeal is pending, it has no jurisdiction to change such order; nor is an order refusing to hear a motion to set aside a former order denying a new trial appealable, and an appeal therefrom must be dismissed.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial, and from an order refusing to hear a motion to set aside the order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

D. K. Trask, W. H. Shinn, J. L. Copeland, W. J. Murphy, and Van Sciever & Allen, for Appellant.

W. F. Fitzgerald, Attorney General, and W. H. Anderson, Assistant Attorney General, for Respondent.

HARRISON, J.—The defendant was convicted of rape in having sexual intercourse with a female child under the age of fourteen years, and has appealed from the judgment of conviction and from an order denying a new trial.

There was sufficient evidence before the jury to authorize them to find the fact of sexual intercourse by the defendant with the child, and that she was at the time under fourteen years of age, and their verdict thereon is not open to review.

The crime is charged to have been committed March 30, 1895, and for the purpose of establishing the age of the girl at that date her mother testified that she was born June 14, 1881. The prosecution then offered in evidence a Bible, in which was entered the record of the birth of a girl named Elsie Shipton (the name

of the prosecuting witness) on the 14th of June, 1881. The court admitted the Bible in evidence against the objection of the defendant.

The mother testified that she made the entry of Elsie's birth some time after the girl was born, she thought at some time during that year. There were appearances on the face of the entry that the date had been changed by being written over after it had originally been written, but it does not appear that any other date was originally in the entry, and the mother testified that she had not changed it. Whether there had been a material alteration in the entry was to be determined by the court when it was offered and before it should be presented to the jury. In the absence of any showing to the contrary, we must assume that the court was satisfied that the alteration was immaterial. Like matters addressed to its discretion, its ruling in this respect is not open to review, unless it is made to appear that the discretion was abused.

It does not clearly appear that the book in which the entry was made was a family Bible. There was no direct evidence of this fact, and, although the mother testified that it came into her possession in 1876, it was not shown from whom she received it or in what manner it came into her possession. Nor was it shown that the other persons whose births and deaths were entered therein were members of her family, or that they had the same or similar names. We need not, however, determine whether the character of the book was sufficiently shown (see *Jones v. Jones*, 45 Md. 160), since the court erred upon other grounds in permitting the entry to be read in evidence.

An entry in a family Bible is a written declaration of a fact made out of court, not under the sanction of an oath, or with any opportunity to test its correctness by means of cross-examination. It is but a declaration by the person who made the entry, and is of the same character as any other declaration, whether written or oral. Being made in a book where entries of this nature are often made, it is entitled to greater weight by reason of its formality than would be a similar verbal declaration, but the principles upon which it is received in evidence are the same as govern verbal declarations of the same fact. It is hearsay evidence, and subject

to the general rule by which that class of evidence is governed, that the fact sought to be established cannot be otherwise shown. This rule was formulated by Chief Justice Marshall in *Mima Queen v. Hepburn*, 7 Cranch, 290, in the following terms: "Hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge." Such evidence is admitted in matters of pedigree, but, as Mr. Greenleaf says (Greenleaf on Evidence, sec. 103): "The rule of admission is restricted to the declarations of deceased persons who were related by blood or marriage to the person." Taylor, in his treatise on Evidence, ninth edition, section 641, says: "Where, however, the declarant is himself alive and capable of being examined his declarations will be rejected"; and in the American notes to this edition it is said: "A familiar form of record is the family Bible. Declarations in such form of facts of pedigree, made by deceased members of the family, are competent evidence of the facts therein stated." (See, also, *Dupoyster v. Gagani*, 84 Ky. 403; *McCausland v. Fleming*, 83 Pa. St. 36; *Leggett v. Boyd*, 3 Wend. 376; *Greenleaf v. Dubuque etc. R. R. Co.*, 30 Iowa, 301; *Campbell v. Wilson*, 23 Tex. 252; 76 Am. Dec. 67; *Robinson v. Blakely*, 4 Rich. 586; 55 Am. Dec. 703; 1 Phillips on Evidence, *248, *250.) These principles have been incorporated into the provisions relating to evidence in the statutes of this state. In part IV of the Code of Civil Procedure, after declaring the general principles governing the admissibility of evidence, section 1870 declares: "In conformity with the preceding provisions evidence may be given at a trial of the following facts; . . . 4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage or death of any person related by blood or marriage to such deceased person. . . . 13. Monuments and inscriptions in public places as evidence of common reputation; and entries in family Bibles or other family books or charts, engravings on rings, family portraits, and the like, as evidence of pedigree."

By the preceding sections, which control the admission of evidence of the facts thus enumerated, and which merely declare the rules of evidence previously existing, the declaration or statement of a third person is admissible only in certain ex-

ceptional cases. The provision in this section permitting evidence to be received of the written declaration of a deceased person in the instances there mentioned makes it evident that the declaration of a living person is not to be received. Neither does the section authorize the admission of a written declaration simply because it is made in a family Bible, unless it is otherwise admissible as a written declaration; and such entry, when admissible, is only to be received "as evidence of pedigree." Although the term "pedigree" includes the facts of birth, marriage, and death, and the times when these events happened (Greenleaf on Evidence, sec. 104), and evidence of these facts is pertinent for the purpose of establishing pedigree, the several facts, or either of them, do not of themselves constitute pedigree, and a case in which the age of an individual is the issue to be determined is not a case of pedigree. "A case is not necessarily a case of pedigree because it may involve questions of birth, parentage, age, or relationship. Where these questions are merely incidental and the judgment will simply establish a debt or a person's liability on a contract, or his proper settlement as a pauper, and things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death, or birth are incidentally inquired of." (*Eisenlord v. Clum*, 126 N. Y. 566. See, also, *Haines v. Guthrie*, L. R. 13 Q. B. Div. 818.) In *Leggett v. Boyd*, *supra*, the defense of infancy was made to an action upon a promissory note, and in support of this defense the family Bible of the parents was offered in which the entry of his birth had been made by his mother; and its exclusion was upheld upon the ground that the person by whom it was made was in court and could have been examined. *Campbell v. Wilson*, *supra*, was of the same character, and the evidence was excluded because it was shown that the mother was within reach of the process of the court. *Greenleaf v. Dubuque etc. R. R. Co.*, *supra*, was an action to recover damages for negligence in causing the death of a person, and, for the purpose of establishing his age as an element in determining the amount of damages, the plaintiff was allowed to show the date of his birth from an entry in the family Bible. This was held to be error, on the ground that it was not shown that the person who made the entry was dead. In *Robinson v. Blakely*, 4 Rich. 586, 55 Am.

Dec. 703, the family register of births and deaths was held inadmissible to show the age of the plaintiff for the purpose of determining whether the action was barred by the statute of limitations, upon the ground that the father who made the entry was still alive, the court saying: "These entries stand on no higher footing than other declarations, and are entitled to no higher consideration, except that if made at the time the fact occurred they are more reliable." The admissibility in evidence of these facts is limited by Mr. Greenleaf in the section above referred to, to cases where they arise incidentally and in relation to pedigree as follows: "Thus an entry by a deceased parent, or other relative, made in a Bible, family missal, or any other book, or in any document or paper, stating the fact or date of the birth, marriage, or death of a child or other relative, is regarded as the declaration of such parent or relative in a matter of pedigree." Taylor says (Taylor on Evidence, 650): "Entries made by a parent or relation in Bibles, prayer-books, missals, almanacs, or, indeed, in any other book, or in any document or paper, stating the fact and date of the birth, marriage, or death of a child or other relation, are also evidence in pedigree cases as being written declarations of the deceased persons who respectively made them."

The entry in the Bible in the present case was shown to have been made by Mrs. Shipton, and, as she was present in court and had testified to the date of the child's birth, it was not competent for the prosecution to introduce as a piece of substantive evidence in support of this issue her written declaration made several years previously. Nor can it be said that the error was harmless. The evidence was not cumulative, but was of an entirely different character from any other evidence in reference to the child's age, and the jury may well have given it a credit by reason of its formality and apparent authenticity which they would not grant to the living witness who testified respecting the age.

The motion for a new trial was denied, and judgment sentencing the defendant to imprisonment in the state prison rendered and entered November 23, 1895, and on the same day the present appeal was taken from this judgment and order. September 21, 1896, the defendant made a motion to set aside

the order denying his motion for a new trial, and offered to read several affidavits in support of the motion. The court refused to entertain the motion, or to hear or consider the affidavits. From the order thus refusing to hear his application the defendant has taken an appeal. The attorney general has moved to dismiss this appeal. By the appeal from the order denying a new trial the subject matter of that order was removed from the superior court, and while the appeal was pending that court had no jurisdiction to change the order. Besides, an order refusing to hear a motion to set aside a former order denying a new trial is not appealable.

The appeal from the order of September 21, 1896, is dismissed. The judgment and order denying a new trial are reversed, and a new trial ordered.

Van Fleet, J., and Beatty, C. J., concurred.

[S. F. No. 1108. Department One.—October 9, 1897.]

Estate of MARTINA CASTRO DEPEAUX, Deceased; Appeal
of M. ELIZABETH PECK.

APPEAL—FAILURE TO FILE TRANSCRIPT—UNSETTLED BILL OF EXCEPTIONS—NEGLECT OF APPELLANT—DISMISSAL.—It is the duty of a party seeking to avail himself of a bill of exceptions, for the purpose of review upon appeal, to take whatever steps may be necessary to procure its settlement; and since the judge who tried the case is not required and cannot be compelled to settle the bill, after his term of office has expired, it is necessary to apply to this court for an order directing its settlement; and where no steps are taken within a reasonable time to secure the settlement of the bill of exceptions, the appeal will be dismissed upon motion of the respondent for failure to file the transcript within the time limited therefor.

MOTION in the Supreme Court to dismiss an appeal from an order of the Superior Court of the City and County of San Francisco.

The facts are stated in the opinion of the Court.

C. B. Younger, for the Motion.

J. F. Utter, and J. J. Scrivner, Contra.

THE COURT.—Motion to dismiss the appeal. The appellant was appointed special administratrix of the above estate

December 12, 1895, and on December 14, 1896, the superior court made an order revoking her letters of special administration. December 23, 1896, she appealed to this court from this order, and thereafter served upon the respondents a proposed bill of exceptions, to which amendments were proposed by them. She, declining to accept the proposed amendments, took steps for the purpose of procuring a settlement of the bill. Judge Logan, before whom the proceedings were had, and who was the judge of the superior court at the time the order appealed from was made, went out of office on the first day of January, 1897, and was succeeded by Judge Smith. Judge Logan refused to settle the bill, and Judge Smith held himself to be disqualified from acting in the matter, and, on the 9th of February, 1897, so informed the appellant's attorney, and suggested that he make some application to this court in the matter. Nothing further was done by the appellant in reference to procuring a settlement of the bill, and on August 17th the respondents gave notice of the present motion to dismiss the appeal for failure to file the transcript within forty days after it was taken.

It is the duty of the party seeking to avail himself of a bill of exceptions, for the purpose of obtaining a review of the action of the superior court, to take whatever steps may be necessary to procure its settlement. (Code Civ. Proc., sec. 650; *Klauber v. San Diego etc. Co.*, 98 Cal. 105.) After Judge Logan had ceased to be the judge of the superior court, he was not required nor could he be compelled to settle the bill (*Leach v. Aitken*, 91 Cal. 484), and it was thereupon the duty of the appellant to take such steps as are authorized by law for the purpose of securing its settlement. Section 653 of the Code of Civil Procedure, provides that: "If the judge or judicial officer before the bill of exceptions is settled dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, it shall be settled and certified in such manner as the supreme court may by its order or rules direct." As no rule has been adopted by this court directing the manner in which the settlement shall be had, it was incumbent upon the appellant to make special application to this court for an order directing its settlement, and in that way

render his exceptions available upon the appeal. Such application should have been made promptly and within a reasonable time after she had been informed that Judge Logan refused to act. The policy of our law favors a speedy settlement of the estates of deceased persons, and it is in contravention of this policy for the appellant to allow more than six months to elapse without taking any steps looking toward the determination of her appeal. By the rules of this court an appellant is allowed forty days within which to file the transcript on appeal after the appeal is perfected and the bill of exceptions, if there be one, is settled. A neglect upon the part of the appellant for this period of time to take such steps as are within his power and incumbent upon him to take for the purpose of securing the settlement of the bill is equivalent to his failure to file the transcript within the time limited. If the appellant herein had taken steps to obtain a settlement of the bill of exceptions within forty days after the refusal of Judge Logan was communicated to her, any delay occasioned by the proceedings thereafter pertaining to its settlement would have been merely incident thereto, but her failure to take any such steps for more than six months after his refusal, and where no excuse for such delay is offered, authorizes the conclusion that she has abandoned the exceptions set forth in her bill.

The motion to dismiss the appeal is granted.

[No. 19459. In Bank.—October 9, 1897.]

T. J. HIGGINS et al., Respondents, v. CITY OF SAN DIEGO et al, Respondents, and SAN DIEGO WATER COMPANY, Appellant.

MUNICIPAL CORPORATIONS—SUBSIDY FOR RAILROAD—ILLEGAL CONTRACT.—A municipal corporation not authorized to grant aid to a railroad cannot, directly nor indirectly, make any contract for the payment of money, where an indefinite and inseparable part of the stipulated amount is payable in consideration of the unlawful object of subsidizing a railroad.

Id.—VOID LEASE OF WATER PLANT TO CITY—CONDITION FOR BUILDING RAILROAD—EVASIVE CONTRACT—LEASE TO NOMINAL PARTIES—SUBLEASE TO CITY WITHOUT CONDITION.—A lease to a city by a water company of its entire plant for a term of years, in which the rent reserved is in part con-

sideration of a condition that the water company shall construct a railroad within a specified time, is invalid and void; and where, by an evasive contrivance, the lease containing such condition was made to nominal parties, who, in accordance with the understanding, immediately subleased the plant to the city for the entire term, and for the full amount of rental, but without expressing such condition in the sublease, and the city was thereby induced to agree to pay, under the name of rent, the whole consideration for the undertaking of the water company to build the railroad, and thus indirectly to subsidize the railroad, the contracts of lease and sublease are wholly void from their inception.

ID.—OPTION TO TERMINATE LEASE—VOID PURCHASE BY CITY—RIGHTS OF NOMINAL LESSEES.—The city not being permitted to subsidize a railroad directly or indirectly, could not buy an option, to be exercised either by itself or by others, to terminate its agreement to pay rent, upon failure of the lessor to build a railroad; and although the right to terminate the agreement for failure to construct the railroad was left in the nominal lessees, it is immaterial whether that right was to be exercised in their own behalf and at their own discretion, or as trustees for the city.

ID.—CONDITION SUBSEQUENT—CONSIDERATION.—The fact that the condition for the construction of the railroad was put in the form of a condition subsequent, upon the breach of which the lease might be terminated, does not prevent the condition from forming part of the consideration for the stipulated payments of rent; but the option to terminate the lease for breach of such condition is valuable to the party paying the rent, and burdensome to the party charged with the condition, and is a good consideration for the agreement to pay the rent.

ID.—WAIVER OF CONDITION—NONPERFORMANCE—VOID CONTRACT.—The contract being void for want of power in the city to expend corporate funds in aid of the construction of a railroad, it cannot aid the contract that the city waived compliance with the condition for its construction, and it is immaterial that the railroad was never constructed or operated, or that its construction was never commenced.

ID.—VOID RESOLUTION OF COUNCIL AS TO LEASE—ABSENCE OF AUDITOR'S CERTIFICATE—NO PRESUMPTION OF AUTHORITY.—A resolution of a city council authorizing the mayor to execute a lease of a water plant, which had not previous to its passage been presented to the auditor as required by the city charter, and which lacked his required certificate that the contemplated indebtedness or liability could be incurred without a violation of the restrictions imposed by the charter, is fatally defective and void; nor had the water company the right to presume that the council would not have authorized the mayor to act, in violation of the charter, without the proper certificate of the auditor.

ID.—VALIDITY OF CHARTER PROVISION.—The provision of the city charter requiring the auditor's certificate is not invalid, as being an attempt to invest a ministerial officer with judicial powers and functions; but such provision is a mere restriction upon the legislative power of the council, requiring them to go to the best source of information for the fact upon which their right to act depends.

ID.—SUPPLY OF WATER FOR CITY—ORDINANCE REQUIRED—JOINT RESOLUTION NUGATORY.—Where the only authority conferred upon the council by the

charter to adopt and carry out means for securing a supply of water for the use of the city and its inhabitants is found in the enumeration of matters as to which the council is empowered to pass ordinances, which cannot take effect without publication, an unpublished joint resolution authorizing the mayor to lease a water plant is nugatory.

LD.—CONTRACT FOR FUTURE PAYMENT BY CITY—CASE AFFIRMED.—The case of *McBean v. Fresno*, 112 Cal. 159, affirmed as to the power of a city to make contracts *in futuro*, involving the payment of moneys annually during a long period of time, without violating the provision against indebtedness in excess of revenue, if the annual payment does not exceed the revenue for the year in which it is to be made, and also as to the conditions under which such contracts may extend beyond the term of office of the trustees who authorize it.

ID.—INVALID CONTRACT—RATIFICATION—ESTOPPEL.—Where the objection to a contract made by a city for the lease of a water plant is that it is void as involving a subsidy for a railroad, the contract is incapable of ratification, directly or indirectly, and the city cannot be estopped from denying the validity of the contract because the water company was required by the city to expend a large sum of money in extending the plant, and because the city refused to redeliver possession of the plant when demanded.

ID.—GENERAL POWER OF CITY AS TO WATER SUPPLY—LEASE OF PLANT FROM YEAR TO YEAR—REASONABLE VALUE OF USE—PROVISION AGAINST EXCESS OF REVENUE.—Although the express contract of the city to lease the water plant for a term of years at a fixed rental was invalid and void, yet as the city has the general power to contract for a water supply for itself and its inhabitants, it may lease a water plant for a year, and renew it from year to year, and it is liable to pay the reasonable value of the use of the plant actually enjoyed, provided the claim of the water company for the reasonable value of the use does not exceed the amount of unappropriated revenue for the respective fiscal years during which the city had the use of the plant; but claims for such use accruing at a time when there were no unappropriated funds to meet them are void, like other claims upon exhausted revenues, and will not warrant a judgment of any character.

ID.—FORM OF JUDGMENT FOR REASONABLE VALUE OF USE—GENERAL JUDGMENT AGAINST CITY—PROVISION AS TO PAYMENT.—A judgment for the reasonable value of the use of the water plant, after ascertaining in what years the claims of the water company for such value were not in excess of the unappropriated revenues of that year to meet them, should not be rendered so as to be payable only out of those revenues, but should be in the form of an ordinary general judgment for whatever amount shall be found due, without any direction as to the revenues out of which the judgment shall be satisfied, or any direction as to the method of its payment, for which some future provision might be made by the city, although there might be no revenues of the fiscal year in which the debt was incurred out of which it could be satisfied.

APPEAL from a judgment of the Superior Court of San Diego County. J. W. McKinley, Judge.

The facts are stated in the opinion of the court.

Works & Works, for Appellant.

H. E. Doolittle, City Attorney, T. L. Lewis, Deputy City Attorney, William H. Fuller, and C. L. Barber, for City of San Diego and its Auditor and Treasurer, Respondents.

Luce & McDonald, for San Diego Flume Company, Respondent.

Haines & Ward, for Plaintiffs, Respondents.

[THE COURT.—On a former hearing of this cause judgment in favor of the city of San Diego was reversed, with direction to the superior court to enter judgment in favor of the water company for the reasonable value of the use of its distributing plant, etc., said judgment to be payable only out of the revenue of those fiscal years during which the city held possession of the plant. A rehearing was ordered principally upon the question as to the proper form of the judgment. Upon further consideration of the case, we have reached the conclusion that the water company should have an ordinary general judgment for whatever amount shall be found due it, without any direction as to the revenues out of which the judgment shall be satisfied. The opinion rendered at the former hearing must also be modified in the other particulars hereinafter stated.

We have no desire to disturb the principle that no indebtedness or liability incurred in any one year shall be paid out of the ordinary income or revenue of any future year, which principle has been declared by a long line of decisions running from the case of *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641, to *McBean v. Fresno*, 112 Cal. 159; 53 Am. St. Rep. 191. Future provision might be made for the payment of a debt, although there might be no revenues of the fiscal year in which the debt was incurred out of which it could be satisfied—as, for instance, by the adoption by the people of a proposal to pay it, or by other methods that might possibly be suggested; and a direction in a judgment that it should be paid only out of the revenues of a certain year might be held to preclude its payment in any other way. Merely putting a demand in the form of a general

judgment would not in any way take it out of the general rule that the ordinary revenues of a future year cannot be applied to the payment of a liability in a previous year, as held in *Smith v. Broderick*, 107 Cal. 644; 48 Am. St. Rep. 167. We think, therefore, that in a case like the one at bar, there should be a general judgment in the usual form without any direction as to the method of its payment. In *Weaver v. San Francisco*, 111 Cal. 419, and in one or two other cases, where it was directed that the judgment should be satisfied out of the revenues of the fiscal year in which the services sued for were performed, the court was only considering the question whether the ordinary revenues of a fiscal year could be applied to the satisfaction of debts of a previous year; and there was not in the mind of the court the possibility of a provision for raising an extraordinary revenue by a vote of the people, or in some other way, for the express purpose of paying such debts. If that view had been suggested to the court, the judgment in those cases would undoubtedly have been a general one. At all events, we are satisfied that, for the reasons above suggested, the judgment in such a case should be general and without any restriction that might embarrass future action.

Our former opinion is also modified so far as it may seem in any of its expressions to go beyond the decision in *McBean v. Fresno*, *supra*, upon the question of the validity of a contract of a municipal corporation extending over a series of years beyond the term of office of the trustees who authorize it.

Our former opinion is also modified as follows: We cannot direct the superior court to enter a judgment upon the findings for the reasonable value to the city of the water company's plant and of the water supplied, because it does not appear that the claims of the water company all accrued at a time when there were unappropriated revenues to meet them, and it will be necessary for the court to ascertain as the basis of its judgment against the city just when the claims of the water company for reasonable value of use, etc., equaled the amount of unappropriated revenues for the respective fiscal years during which the city had the use of the water company's plant. Claims for use of plant and value of water supplied after such time are like other claims upon exhausted revenues; they are void, and will not warrant a judgment of any character.

In all other respects our former opinion is readopted.

The judgment of the superior court is reversed, and the cause remanded for further proceedings in accordance with our former opinion as herein modified.]

HARRISON, J., concurring.—Upon the former decision in this case I dissented from the conclusion reached by a majority of the court, upon grounds not involving the form of the judgment to be entered. The form of judgment then directed was in accordance with the directions of this court in the case of *Weaver v. San Francisco*, 111 Cal. 319, in which I participated. As is very pertinently observed in the foregoing opinion, the only question then before the court was the right to divert the revenues of one fiscal year to the payment of liabilities incurred during a preceding fiscal year. It was not intended to hold, and there is no reason for holding, that, if at any future time the municipality shall by any legal mode assume the payment of such liabilities, it cannot be enforced out of the funds thus provided for their payment, since in that case the assumption of the liability would form the basis of a new obligation which would not be limited or affected by the previous judgment. But, as in any attempt to enforce a judgment against a municipality, the municipality would have the right to show in what year the obligation upon which the judgment was rendered was incurred, and to insist that it should not be collected out of the ordinary revenues of any succeeding year, the form in which the judgment is entered is not material to the rights of the parties, but is only a matter of convenience, and may be varied according to the nature of the action. I therefore concur in the foregoing opinion to the extent that it gives directions as to the form in which the judgment should be entered, and I also concur in the other respects in which the former opinion is modified.

[BEATTY, C. J., concurring.^{xxx}—On a former hearing of this cause, the judgment in favor of the city of San Diego was reversed, with directions to the superior court to enter judgment in favor of the water company for the reasonable value of the use of its distributing plant, etc., said judgment to be made payable only out of the revenues of those fiscal years during

which the city held possession of the plant. The direction that the judgment should be entered in this specific form was based upon the decision of Department One of this court in *Weaver v. San Francisco*, 111 Cal. 319, and the apparent acceptance of the doctrine of that case by Department Two in *McBean v. Fresno*, 112 Cal. 159; 53 Am. St. Rep. 191.

But both of these cases were decided after the submission of this case, and the question of the form of the judgment had not been raised or argued by counsel for these parties. For that reason a rehearing was granted, in order that the whole matter might be reconsidered in the light of fuller argument before the court in Bank should commit itself to a final decision upon a proposition so important in its consequences.

[What we have to decide is the proper application of section 18 of article XI of the constitution to a case like this: A city has an income and revenue provided for the ensuing fiscal year amounting to one hundred thousand dollars over and above all fixed charges, such as salaries of officers established by law. At the beginning of the year it enters into a contract for the construction of some needed public work and agrees to pay therefor on completion fifty thousand dollars. The contract is not only valid but is fair and honest, and has been awarded under open competition to the lowest responsible bidder, at a price which will enable him to make only a reasonable profit. The contractor has done everything that prudence and good faith could possibly demand, and he proceeds at large outlay and expense to the faithful performance of his agreement. But it requires the whole year for the completion of his contract, and before his claim for compensation can mature or be presented for allowance the city has entered into other contracts and incurred other liabilities, for which it has expended the whole revenues of the fiscal year, and its treasury is completely bare. Our contractor, under these circumstances, presents his claim and it is duly allowed, but he can get no warrant from the auditor, and if he could the treasurer would not be able to pay it. He sues the city, and there is no defense except that the money which should have been reserved for the payment of his claim has been misappropriated to the payment of claims that were invalid. Must he then be content with a judgment payable only out of the exhausted revenues of the year in which

his contract was made and performed? Must he, in other words, be content to receive nothing merely because the funds to which he was justly entitled have been illegally misapplied?

The question before us is, whether section 18 of article XI of the constitution leads to such results. That section reads as follows: "No county, city, town, township, board of education, or school district shall incur any indebtedness or liability, in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void."

The case of *Weaver v. San Francisco*, *supra*, was not decided exclusively upon this section of the constitution, but was rested, in part at least, upon certain provisions of the charter of San Francisco, which, however, are in the same line and designed to enforce the same policy. Similar provisions of the charter of San Diego have been cited in this case. The meaning of all these provisions in the various municipal charters and in the constitution seems to be too plain for any possible misunderstanding, and is simply this: that a county, city, town, etc., may make valid contracts and incur binding liabilities only to the extent of the revenue provided in advance for their discharge. Such contracts and such only are valid, all others are utterly void. Nothing is said as to the application of each year's revenues, but it is plainly implied that they are to be used for the purpose of discharging valid obligations, and must not be misapplied to the payment of invalid claims.

Unfortunately, however, the proper course plainly indicated by the constitution is not invariably followed. A city, as in the case above supposed, after entering into a valid contract involving a liability not in excess of the revenues provided for its discharge, expends all of its available funds in payment of claims which are of no obligation because they are based upon subse-

quent contracts, which are void, for the reason that they involve liabilities which, added to those previously and lawfully incurred, exceed the revenues provided for the year. Such apparently is the case here, and such was the case of *Weaver v. San Francisco*, *supra*, in which the court used the following language, which was afterward quoted approvingly in *McBean v. Fresno*, *supra*:]

"Whoever deals with a municipality does so with notice of the limitation of its powers, and with notice also that he can receive compensation for his labor and materials only from the revenues and income previously provided for the fiscal year during which his labor and materials are furnished; and with the knowledge, too, that all other persons dealing with the municipality have the same rights to compensation, and are subject to the same limitations as he is. Even though at the time of making his contract there are funds in the treasury sufficient to meet the amount of his claim, he is charged with notice that these funds are liable to be paid out for municipal expenditures before his contract can mature into a claim against the city; and if others whose claims have accrued subsequent to his are able to intercept these funds, he is in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim. He acquires no claim in the nature of a lien upon these funds for the amount of his demand, nor is there any legal obligation upon the municipality any more than upon any other debtor to pay the claims against it in the order in which they are incurred, unless they are presented in that order and in such condition and with such formalities as entitle the claimant to immediate payment. In dealing with the municipality he must rely upon the integrity of its officers that they will not incur any liabilities during the year in excess of the income and revenues provided for that year, and, as a prudent man, he will ascertain not only the amount of that income, but also the amount of the claims already existing and of those that are likely to be incurred."

[This language is, in my opinion, too broad and sweeping, and sets forth a doctrine which cannot be deduced from the constitution. I concede that one who deals with a city is charged with notice of the limitations upon its powers, and that he can be compensated for his labor and materials only out of the in-

come and revenue previously provided; and, also, that he must know that all other persons stand upon the same footing. But I cannot admit that he is charged with notice that the city will violate its charter and the constitution by expending the funds properly applicable to the payment of his valid claim in the payment of claims founded on subsequent contracts which are void for the very reason that the unappropriated revenues of the city are not sufficient to meet them. I do not admit that others whose claims have accrued subsequently to his can lawfully intercept any money necessary to discharge his claim. They may do it in fact—as in the Weaver case—and he may find himself practically in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim, but he is in that condition not because the constitution intended such a result, but only because the city has violated the constitution in misapplying the funds to which he was first entitled. True, he has no lien upon the funds, because they are not under his control, but this is no answer to the justice of his claim, and only makes it more sacredly the duty of the city to protect him in a right which he cannot himself protect.

And I insist that there is a legal and constitutional obligation resting upon the municipality different from that which rests upon any other debtor in this respect. An ordinary debtor may incur obligations in excess of his ability to pay, and he may pay them in such order as he chooses. But a city cannot incur valid obligations to pay any more than its revenue already provided will enable it to pay. The moment it oversteps that mark its contracts cease to be valid, and it cannot pay the claims founded upon such invalid contracts. It is under a legal obligation not to pay them. But its legal and valid obligations—that is to say, all of its obligations first incurred up to the amount of its revenues—it must pay, and as to these, of course, it is a matter of indifference in what order they are paid, if they are all paid in full, as they necessarily must be if no part of the revenues is misapplied, embezzled, or lost. But it is far from being a matter of indifference if invalid claims founded upon void contracts are paid before valid claims can mature.

Nor do I think that one dealing with a municipality must rely upon the integrity of its officers, that they will not incur

liabilities during the year in excess of the income and liabilities provided for that year. He has something better to rely upon, viz., this very section of the constitution which we are considering, and which puts it out of the power of the officers to incur any liability in excess of such income and revenues. In entering into any contract he is bound to ascertain how far the revenues have been appropriated to existing liabilities, but he is not bound to anticipate, and no amount of prescience or foresight could enable him to anticipate, what illegal claims would be incurred by officers willing to violate the city charter and the constitution.

For these reasons I find myself unable to accept the doctrine of *Weaver v. San Francisco*, *supra*, and the conclusion deduced from it, that in cases of this kind the judgment must be made payable only out of the revenues of a particular year or years. I think, on the contrary, that in such actions the sole question is whether there is a valid obligation. If there is, the plaintiff should have judgment in the ordinary form, and there will be no difficulty about paying it if the funds properly applicable to its payment have been neither misapplied, embezzled, nor lost. If they have been misapplied, embezzled, or lost, the city should not be allowed to allege its own misconduct as a reason for limiting its creditor to a judgment which will be fruitless.

In determining the validity of the obligation, it will, of course, always be necessary to inquire whether at the date of its assumption there were unappropriated revenues to meet it, because if there were not, there will be no liability resting upon the city, and the claimant will have no right to a judgment in any form.

But if at the time the contract was made, there were unappropriated revenues to meet it, in whole or in part, the claimant will be entitled to a judgment for the amount of his claim, or such part of it as the funds applicable to its payment will cover.

If this were a new question, unembarrassed by any previous decisions of the court, the views above expressed would, it seems to me, meet with unhesitating acceptance. But it is not a new question and was not entirely new when *Weaver v. San Francisco*, *supra*, was decided; for in that case the court seems to have felt itself constrained by previous decisions, which were understood as establishing the doctrine there announced. I think, however, that nothing had been previously decided which

went to the extent of the Weaver case, although some of the opinions may contain *dicta* which point in that direction.

The first case in which section 18, of article XI, of the constitution, came to be considered was *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641. That was a proceeding by *mandamus* against the auditor of San Francisco to compel him to draw his warrant for the amount of a claim for gas furnished to the city and county. The case does not show in what year the gas was furnished or out of what year's revenue payment was demanded, nor does it show whether at the time it was supplied there were any unappropriated revenues of the current year applicable to the payment. Apparently, however, the case was sent to the superior court to have these or some of these questions determined, and, in the course of a short opinion stating the reasons for making that order, Judge Ross, referring to section 18, of article XI, said that the framers of the constitution meant that "each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." So far as we can see from the report of that case this was mere *dictum*, but properly understood it undoubtedly states the real intention of the framers of the constitution. They did intend that each year's revenue should pay each year's expenses, and that no claims upon one year's revenues should be made a charge upon the revenues of future years.

But how did they propose to accomplish that object? The words of the constitution answer: by making all obligations contracted in excess of the revenues void and unenforceable, not by making valid obligations unenforceable merely because the city revenues have been exhausted in payment of claims which the constitution declares void. If the behests of the constitution are obeyed in this matter, the object of its framers will be attained, for the extent of the legal obligation of a city is exactly measured by the amount of its revenues, and, if the revenues of one year are properly expended, there can be no valid claim carried over against the revenues of a succeeding year. If, however, the constitution is deliberately or recklessly violated, it cannot be a matter of surprise if consequences follow that were not in the contemplation of its framers, and those who

have caused the difficulty ought to be the last to complain of it.

From what has been said it is clear that the *dictum* of Judge Ross in the Brickwedel case went no further than to declare the true intention of the framers of the constitution. What consequences would follow from disregard of the provision which was designed to carry out that intention was a question not involved in that case, and of course not decided.

It is further to be observed of this case, as of the cases in which it was followed (*Shaw v. Staller*, 74 Cal. 258, *Schwartz v. Wilson*, 75 Cal. 502, *Smith v. Broderick*, 107 Cal. 644, 48 Am. St. Rep. 167, *McGowan v. Ford*, 107 Cal. 177), that they were each and all of them proceedings by *mandamus* against the auditor or treasurer to compel the drawing or payment of warrants against or out of a particular fund, and the sole question involved was whether it was the legal duty of those officers to pay demands upon the revenues of one fiscal year out of the revenues of another fiscal year. It may be conceded that those decisions have conclusively established the proposition that it is not the legal duty of those officers to make such payment. And the case of *Smith v. Broderick*, *supra*, establishes the further proposition that a consent judgment based upon an illegal demand will not authorize payment out of the proceeds of a special tax levied for the express purpose of paying it. But the question here is, whether the holder of a legal and valid claim shall have a plain and ordinary judgment establishing his right. The question whether any means of paying such judgment can be lawfully provided is not necessarily involved, but when that question arises, if it ever does, the case will be widely different from that of *Smith v. Broderick*, *supra*. There will be the difference, that is to say, between the effect of a judgment establishing a valid claim which is the result of a *bona fide* contest in a court of competent jurisdiction, and a mere confession of judgment upon an invalid claim.

If the views above stated are correct, it has been shown that prior to *Weaver v. San Francisco*, *supra*, nothing has been decided by this court which sustains the doctrine of that case, and it is not sustained by the constitution.

In *McBean v. Fresno*, *supra*, the question as to the form of judgment in such cases was not involved, and the opinion in

Weaver v. San Francisco, supra, was merely quoted *arguendo* upon another point.

The case of *Bradford v. San Francisco*, 112 Cal. 537, was correctly decided, but it has no bearing on this case.

The result of this discussion is, that our former judgment must be modified so far as it directs the future proceedings in the superior court. We cannot direct the superior court to enter a judgment upon the findings for the reasonable value to the city of the use of the water company's plant and of the water supplied, because it does not appear that the claims of the water company all accrued at a time when there were unappropriated revenues to meet them, and it will be necessary for the court to ascertain as the basis of its judgment against the city just when the claims of the water company for reasonable value of use, etc., equaled the amount of unappropriated revenues for the respective fiscal years during which the city had the use of the water company's plant. Claims for use of plant and value of water supplied after such times are, like other claims upon exhausted revenues, void, and will not warrant a judgment of any character.

We wish also to qualify our former opinion so far as it may seem in any of its expressions to go beyond the decision in *McBean v. Fresno, supra*, upon the question of the validity of a judgment of a municipal corporation extending over series of years beyond the term of office of the trustees who authorize it. In all other respects our former opinion is readopted.

Temple, J., concurred. }

The following is the opinion rendered on the former hearing by the court in Bank, July 25, 1896:

BEATTY, C. J.—This appeal presents another phase of the varied litigation that has arisen out of the several contracts discussed in the two cases of *San Diego Water Co. v. San Diego Flume Co.*, reported in 100 Cal. 43, and 108 Cal. 549. A portion of the transactions out of which the present controversy arises is very fully stated in the opinions delivered in those cases, but, for the sake of clearness, it will be necessary to restate the same matters here at least in outline, and to present some others in fuller detail.

The San Diego Flume Company and the San Diego Water Company are California corporations organized for the purpose, among others, of furnishing water to the city of San Diego and its inhabitants. The flume company was owner of a water supply and a system of pipes by which it brought water to the city limits, but had no distributing system within the city. The water company had pipes laid throughout the city and all the necessary facilities for distributing water to consumers. This being the case, on November 6, 1890, the two companies entered into an agreement in writing by which the water company was constituted the sole agent of the flume company for the sale of its water to consumers within the city. Under and in pursuance of this contract, the pipes of the two systems were connected at the city limits, and the water company commenced to sell the water supplied by the flume company, and to deliver the same through its distributing system to consumers within the city, and so continued to do until the first day of June, 1891, when its entire distributing plant was turned over to the city of San Diego under a contract, the validity of which is the principal question involved in this appeal.

In form, this contract was a lease from the water company to Bryant Howard and four other citizens of San Diego, and a sublease from them to the city of the entire plant of the water company, with a daily supply of three million gallons of water from the flume company, for the term of twenty years from and after June 1, 1891, at a monthly rental of nine thousand one hundred and sixty-six dollars and sixty-five cents. The lease from the water company to Howard and others was dated April 13th, and their sublease to the city April 18, 1891, but the court finds that both were executed on the 18th, and that "the said lease of said water plant and the sublease thereof constitute a single contract, which was intended to be a lease of said water plant from said water company to said city; that said Bryant Howard and his associates were not interested in said lease from said water company to them, or in said sublease from them to said city, nor was it intended by any of the parties thereto that they should have any interest therein. They were nominal parties only, and their names were used for the sole purpose of effecting a lease of said water plant from said water company to said city and to avoid making said lease direct from

the water company to the city. It was intended and agreed that the said Howard and associates should not be under any liability of any nature, and also that the lease to them should be null and void if the city did not consent to receive from them a transfer or sublease thereof. These facts in regard to the lease and sublease are not only found by the court, but they are clearly evident from the terms of the instruments themselves, which are fully set out in the record, and are confirmed by the fact that the sublease, with the covenants of the city for payment, etc., was immediately assigned by Howard and others to the water company, by which means the city became directly liable to that corporation, if the contract was valid, for the stipulated monthly payments.

In pursuance of this agreement, the water company, on the first day of June, 1891, delivered its water plant to the city, and from that time until after the commencement of this action supplied to its mains so much of the flume company's water as the city required for the use of itself and its inhabitants. From the time it took possession of the plant the city collected the dues of water consumers, so far as they were collected, and with the exception of two months it regularly allowed and approved the bills of the water company for the monthly rental of nine thousand one hundred and sixty-six dollars and sixty-five cents. It also applied to the payment of these bills the moneys collected from water rates less the cost of collection and management. But the payments so made fell far short of the stipulated rent—that is to say, when the rent due according to the terms of the lease amounted in round numbers to two hundred thousand dollars, but ninety thousand dollars had been paid, leaving one hundred and ten thousand dollars still due. And this deficiency was caused in great part by the action of the city authorities in reducing water rates to an unreasonably low figure after obtaining possession of the distributing plant, and by neglecting to collect the rates so reduced.

Such being the situation, the plaintiffs Higgins and Llewelyn, taxpayers of San Diego, in September, 1892, in behalf of themselves and other taxpayers of the city, commenced this action to obtain a decree declaring the lease to the city void, and enjoining the city and its auditor and treasurer from allowing and paying any further claims for rent. The defendants named

in the complaint were the city of San Diego, its treasurer and auditor, Bryant Howard and his associates, the flume company and the water company. Of these defendants only the city, the auditor and treasurer and the water company answered the complaint, and these answers, owing to the subsequent action of the plaintiffs in dismissing their action, will not call for further consideration. The water company, in addition to its answer to the complaint, filed a cross-complaint against its codefendants, the city and its auditor and treasurer. In the first count of its cross-complaint the water company alleged the making of the lease and sublease and the assignment of the latter to itself, its full compliance with all the covenants on its part to be performed, and the failure of the city and its officers to pay the stipulated rent—counting, in other words, upon the written contract. The second count of the cross-complaint was upon a *quantum valebat* for the reasonable value of the use of its plant during the time it had been held and used by the city. The third count was for damages for the unlawful withholding of the plant by the city after demand for its return. To this cross-complaint the city and its auditor and treasurer made answer asserting the invalidity of the lease and sublease upon all the grounds suggested by the plaintiffs and upon other grounds, and defending against the claims for value of the use and for damages. Upon the filing of this answer to the cross-complaint, the original plaintiffs dismissed their action, leaving the contest to be waged between the water company on one side and the city and its officers on the other.

The cause was tried by the court and very full findings made, upon which the court concluded that the water company had no right to recover upon either count in its cross-complaint, and judgment was entered accordingly. From the judgment so entered the water company appeals, contending that, upon the facts found by the court and admitted by the pleadings, the judgment should have been in its favor.

The main question in the case is as to the validity of the written contract between the city and the water company, and this involves an inquiry into the capacity and powers of the respective parties to the contract, the terms of the written instruments and the objects of the transaction.

As to the powers and capacities of the parties: The San Di-

ego Water Company is and then was a corporation organized under the laws of the state of California for the purposes, among others, of supplying, furnishing, and selling water to the city of San Diego and its inhabitants for domestic purposes, and to acquire, by purchase or otherwise, the rights, franchises, works, and equipments, and the real and personal property of other persons and corporations supplying, or authorized to supply, water for said purposes, and to use, control, sell, convey, or lease all such property. The San Diego Flume Company was also a California corporation, organized for the purposes, among others, of diverting water from the San Diego and other rivers and conveying the same by means of aqueducts to the city of San Diego and other places for sale for domestic purposes, irrigation, etc.

The city of San Diego is a municipal corporation of the state of California, organized under a freeholders' charter ratified by the legislature March 16, 1889. (Stats. 1889, p. 643.)

The general features of the lease from the water company to Bryant Howard and others have been sufficiently indicated, but it is necessary here to state more in detail some of its conditions. After providing for the lease of the distributing plant, the sale of three million gallons daily of the flume company's water, and so much more as the city may require, at the rate of five cents per thousand gallons, the payment of the rent, the assignment of the lease to the city and the immunity of the lessees from any personal liability for the rent, the agreement proceeds as follows:

"This lease is made and executed and the amount above agreed to be paid by the parties of the second part on the following conditions, stipulations, and agreements, viz." (except as indicated by quotation marks the substance only of these stipulations is given):

5. That the party of the first part do cause a railroad to be constructed and operated from the city of San Diego to San Quintin in Mexico, or to Fort Yuma in California; work to be commenced thereon within thirty days, and fifty miles of road to be completed and in operation within one year. Sixty-five miles per annum to be thereafter constructed, road to be American standard gauge, well constructed, and, after completion of

first fifty miles, daily and continuously operated for accommodation of freight and passengers.

"7. It is further agreed that should any extensions of the pipe lines or plants of the party of the first part be necessary, during the term of this lease, the parties of the second part or their assigns or sublessee shall have the option to put in such extension, the same to be of the kind and quality now being put in and used by the said party of the first part, or said parties of the second part, or their assigns or sublessee may require such extensions to be made by the party of the first part, in which case the party of the first part shall be allowed for the amount actually invested in such extension the sum of six per centum (6 per cent) per annum, interest payable at the time of paying the monthly amounts called for by this lease; and in case said party of the first part shall fail or refuse to make such extensions when required so to do by the parties of the second part, then the second party may cause such necessary extensions to be made, and deduct the cost thereof from the subsequent rentals falling due."

8. The party of the first part agrees to keep in good repair and look after and care for its plant free of expense to the parties of the second part, etc.

"10. It is also agreed that the parties of the second part, or their assignee or sublessee, shall pay to the party of the first part, for the deterioration of the extension of the pipe lines, or any part of the system, three per centum (3 per cent) per annum on the cost of such extensions; said parties of the second part to have the option of purchasing such extensions and the entire plant at any time during the term of this lease, at the actual first cost thereof to the party of the first part, less the amount paid for deterioration."

"12. And it is expressly understood and agreed that the parties of the second part have the option to terminate this lease, in case any of the conditions, stipulations, or agreements above mentioned shall not be complied with, by giving notice of such option to the party of the first part of one month, and upon returning to the party of the first part, in as good condition as when this lease is executed, ordinary wear and tear and damages of the elements excepted, of the property above described; or, in case of failure to return any part or piece thereof, to pay

said party of the first part the value of all property not returned as aforesaid, and from the time of such notice and surrender the party of the first part shall be restored to all the rights and privileges it now has."

On the same day that this lease was executed—April 18, 1891—Douglass Gunn, as mayor of the city, signed the name of the city to the sublease, which was also signed and delivered by Bryant Howard and others. The sublease, after reciting the execution and substance of the lease, and referring to the conditions upon which it might be terminated, and providing that in case of its termination the sublease itself shall terminate and all parties be freed from liability thereunder, is in its terms a substantial repetition of the lease itself down to the clause providing for the construction of the railroad which is wholly omitted. The ensuing stipulations of the lease as to repairs, extensions, care of plant, interest on costs of extensions, allowance for deterioration, etc., are repeated in the sublease, which concludes as follows:

"And it is expressly understood and agreed that the party of the second part has the option to terminate this lease, in case any of the conditions, stipulations, or agreements above mentioned shall not be complied with, by giving notice of such option to the parties of the first part of one (1) month, and upon returning to the parties of the first part in as good condition as when this lease is executed, ordinary wear and tear and damages by the elements excepted, of the property above described; or, in the case of a failure to return any part or piece thereof, to pay said parties of the first part the value of all property not returned as aforesaid; and from the time of such notice and surrender the parties of the first part shall be restored to all of the rights and privileges they now have; and in the case of the termination of this contract the first parties shall be released from all liability for damages or otherwise by reason of such termination or failure of conditions, terms, or agreements."

The foregoing full statement of certain features of the lease and sublease has been made in view of the contention of counsel for respondent that the manifest purpose of the whole transaction between the water company, Howard and his associates, and the officers of the city, was to accomplish by indirection what could not be done openly and directly, viz., to secure a sub-

sidy from the city or a loan of its credit in aid of the construction of a railroad.

This, however, is not the sole or principal objection to the validity of the contract, and is not the ground upon which the superior court held it invalid. It appears from an opinion of the judge of the superior court, printed as an appendix to one of the briefs, that his conclusion was based upon the provisions of section 18, article XI, of the constitution, and certain provisions of the charter of San Diego. Section 18, article XI, of the constitution reads as follows: "No county, city, town, township, board of education, or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void."

Section 11, article 2, chapter 2, of the city charter (Stats. 1889, p. 658), provides: "No expenditure, debt, or liability shall be made, contracted, or incurred during any fiscal year that cannot be paid out of the revenues provided for such fiscal year. Except as otherwise authorized by this charter, the city shall not, nor shall the common council, the board of education, or any board, department, or officer incur any indebtedness or liability in any manner, or for any purpose exceeding in any year the income and revenue provided for it for such fiscal year. All contracts, indebtedness, or liabilities incurred contrary to the provisions of this section shall be void, and shall not be paid out of the treasury, or constitute or be the foundation of any claim, demand, or liability, legal or equitable, against said city. The words "expenditure," "indebtedness," and "liability" herein used shall include official salaries and the pay of all employees of said city, or of any of its departments."

Chapter 2 of article 6 provides for the contracting of bonded indebtedness, and in section 12 (p. 709) reiterates in more em-

phatic terms the inhibitions quoted from article 2, respecting unsecured or floating indebtedness, and declares that "all officers of said city are charged with notice of the condition of the city treasury and extent of the claims against the same."

Section 14, article 2, chapter 2, of the charter (p. 659) provides: "All ordinances or resolutions appropriating money or for the incurring of indebtedness or liability against the treasurer, introduced in either board of the common council, or in the board of education, or other department or authority, must, before being passed, be presented to the auditor, and until he certifies in writing upon such ordinance or resolution that such appropriation can be made or indebtedness incurred without the violation of any of the provisions of this charter, no further action shall be had upon the same."

The findings in relation to these matters are that the resolution authorizing the mayor to execute the sublease in behalf of the city was passed by the council without obtaining or requesting the certificate of the auditor as provided in the section last quoted, and "that the debt and liability attempted to be incurred by the said city by said lease and sublease, the sum of one hundred and ten thousand dollars per year, could not at the date of said instruments, or at any other time since, be paid out of the revenues of the said city provided for the fiscal year then current, or any fiscal year since the date of said instruments; nor was any provision made for the collection of an annual tax to pay the interest of said indebtedness or to constitute a sinking fund for the payment of the principal. And no election was called or held at which the electors of said city voted upon the question of incurring said liability or consented thereto."

For these reasons, and for these alone, the contract was held invalid by the learned judge of the superior court. As to the other objection above stated he says in the opinion referred to: "While it is very evident from the terms of the contract that the hope that a railroad would be constructed was one of the moving causes for the city authorities entering into the contract, it was not in my opinion a consideration of the contract, but merely a condition subsequent which falls because invalid, without affecting the other provisions of the contract." And in his conclusions of law he holds: "That said lease and sublease were

not void because the amount agreed to be paid was a subsidy to or in aid of the construction of a railroad."

These conclusions are based upon findings to the effect that the city waived the construction of the railroad, and that neither the city, nor its mayor acting in its behalf, was induced to enter into the contract by any promises or representations of the officers or agents of the water company that the railroad would be built.

For all these reasons counsel for appellant assumes that this particular objection to the contract is wholly eliminated from the case, and that the appeal must be determined upon other grounds. Counsel for respondents, on the other hand, insists that the conclusions of the judge of the superior court as to this matter are at variance with his findings of fact, and that the findings must control. He contends, in other words, that considering the character and situation of the parties, the terms of their agreements, the circumstances under which these were entered into, and the purposes of the transaction, as found by the superior court, this court cannot avoid seeing and declaring as matter of law that a part of the consideration for the nine thousand one hundred and sixty-six dollars and sixty-five cents, which the city promised to pay monthly, was the agreement of the water company to cause the construction of a railroad.

These propositions require consideration, and, in considering them, it will be assumed, for the purposes of the discussion, that the contract of the city was entirely free from any objections except those founded upon the condition in the lease to Howard and others, as to the construction of the road. It is claimed by counsel for respondent, and seems to be conceded by counsel for appellant, that a contract by a municipal corporation of California to pay money to any person or corporation to secure the construction of a railroad would be void because in violation of section 31 of article IV of the constitution, which reads as follows:

"The legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the state, or of any county, city and county, city, township, or other political corporation or subdivision of the state now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge

the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; provided that nothing in this section shall prevent the legislature granting aid pursuant to section 22 of this article; and it shall not have power to authorize the state, or any political subdivision thereof, to subscribe for stock, or to become a stockholder in any corporation whatever."

It does not seem entirely clear that such a contract would come within the strict terms of this provision, but certainly it would involve, in part at least, the evils which the constitutional restriction was designed to prevent, because it would afford a ready means of accomplishing by indirection what could not be done openly and avowedly. It is not necessary, however, to decide this question here, for there is no suggestion that the charter of San Diego confers authority upon the common council to expend any portion of the municipal funds in constructing or aiding the construction of railroads; and, in the absence of such authority, an agreement of the character supposed would necessarily be invalid.

This brings us to the question whether the city made or attempted to make such an agreement, or whether the other parties to the transaction managed to secure the advantages of such an agreement by means of the elaborate contrivance to which they resorted.

The solution of this question may be simplified by considering what would have been the consequence if a lease from the water company directly to the city had been executed in the same terms as those contained in the lease from the company to Bryant Howard and associates.

In such case it seems clear that the agreement of the city to pay the so-called rent would have been wholly void, because an indefinite and inseparable part of the stipulated amount would have been payable in consideration of the unlawful object of subsidizing the railroad. And it is no answer to this proposition to say that the provision for the construction of the road was a condition subsequent and void, or that it was waived by the city. If the city had no power to expend corporate funds in

aid of the construction of a railroad, it does not help a contract, based in part upon such unlawful consideration, to show that the city waived compliance with that part of the undertaking of the water company. The vice of such a contract consists in the attempted misapplication of the public funds, and is not cured, but is rather aggravated, by foregoing the advantages bargained for. If a city could not be compelled to pay for a railroad actually built on the faith of its promise to pay, still less could it be compelled to pay for a road not built.

But if we have mistaken the position of appellant, and the argument of counsel goes to the extent of claiming that, because the provision for the construction of the railroad was put in the form of a condition subsequent, it therefore constituted no part of the consideration for the stipulated payments, we can only say that the position is untenable. The option to terminate a contract calling for the monthly payment of large sums of money is certainly valuable to the party charged with such payments, and burdensome to the party against whom it may be exercised, unless he performs some onerous condition. It is, therefore, a good consideration for an agreement to pay money. And if the option is valuable, the condition upon which it may be exercised is equally valuable to the party who is to pay, and burdensome to the party who is to receive payment.

We conclude, for these reasons, that if this had been a lease direct from the water company to the city, it would have been rendered wholly void by the railroad clause. But, in form at least, it was a lease to Howard & Co., and a sublease to the city, and it remains to consider the effect of the elimination of the railroad clause in the sublease.

If the transaction had been in fact what it was in form, this part of the case would have presented no difficulty. There could have been no objection to Bryant Howard, or any citizen of San Diego, stipulating for the construction of a railroad in connection with a lease of the water plant and sale of a water supply. And they, having obtained such a contract, might lawfully have sublet the water plant and water supply to the city in consideration of any agreement on the part of the city which its officers were authorized to make.

But, as we have seen, the transaction was not in fact what it formally assumed to be. It sufficiently appears from the instru-

ments themselves, but more plainly and certainly from the findings of the court, that the whole object of the parties was to effect a lease of the distributing plant and water supply to the city, and that Bryant Howard and others were made formal parties for the single purpose of avoiding a lease direct from the water company to the city. But why this desire to avoid making the lease direct? If the water company had the right and power to lease its plant and water supply to Howard & Co., it had the same right and power to lease to the city, and if the city could agree for a sublease from Howard & Co., it could equally well agree for a lease from the owner of the plant.

There is but one conceivable motive, therefore, for the circuitous course pursued. The parties to the transaction evidently understood that a lease direct to the city with the railroad clause included would be void, but felt that such provision was necessary in order to induce the city authorities to enter into the agreement. This, however, is a conclusion, not of law, but of fact, and cannot be assumed by this court as the basis of its decision in the absence of a finding by the superior court, and, in view of the finding to the effect that the city was not induced to enter into the agreement by any representations that a railroad would be built, the motives and purposes of the water company and its agents become immaterial. The city, according to the findings, was entirely willing to take a lease of the water plant and water supply and pay the rent, irrespective of any condition for the construction of a road, and in making the agreement the members of the common council were wholly uninfluenced by the lure which the water company took such unnecessary pains to hold out to those interested in the growth and expansion of the city.

This being so, the validity of the contract depends upon the true construction and legal effect of the writings in which it is embodied.

As to this, our conclusions may be very briefly stated. They are that the city acquired by the sublease all the rights secured to Bryant Howard, and others, by the original lease, excepting only the right to terminate the agreement for failure to construct the railroad. This, in our opinion, remained in Howard and his associates. But whether, under the circumstances, it remained in them to be exercised in their own behalf and at

their own discretion is not so clear. It may be that they held it as mere trustees for the benefit of the city which, by their contrivance, had been induced to pay, or agreed to pay, the whole consideration upon which it was granted. It makes no difference, however, whether they held this right for their own benefit or for the benefit of the city. In either case it remains undisputed that the city by the connivance of the Water Company and Howard & Co. had been induced to agree to pay, under the name of rent, the whole consideration for the undertaking, such as it was, to build the railroad. This vice, inherent in the contract from its inception, rendered it wholly void. For we have shown that if the original lease, with the railroad clause, had been made directly to the city, it would have been void, not because there is anything unlawful in an agreement for the construction of a railroad, but because it was unlawful to use the revenues of the city to subsidize a railroad, and if this could not be done directly it could not be done indirectly, as was here attempted. If the city could not use its revenues to subsidize a railroad, it could not use them to buy an option to terminate its agreement to pay rent under a lease otherwise valid if its lessor failed to build a railroad. If it could not buy such an option to be exercised by itself it could not buy it for trustees, and still less for strangers.

If these conclusions are correct, it seems unnecessary to advert to the fact that the water company never operated or constructed the railroad, or, so far as appears, ever commenced its construction. The contract being void, the question whether it was performed or not becomes as immaterial as the fact found by the superior court that the condition for building the railroad was waived by the city.

It seems also to be unnecessary to discuss at length the various remaining objections to the validity of the contract, but they will be briefly noticed.

The first of the grounds upon which the superior court held the contract invalid was that the resolution of the council, authorizing the mayor to execute the sublease, was fatally defective, because previous to its passage it had not been presented to the auditor, and lacked his certificate that the contemplated indebtedness or liability could be incurred without a violation of the restrictions imposed by the charter. This defect in the pro-

ceedings is conceded, but the appellant contends that the provision of the charter above quoted is void because it is an attempt to invest a ministerial officer with powers and functions purely judicial. This proposition is not, in our opinion, sustained by the authorities cited, or by any authority. The provision in question does not seek to invest the auditor with any power to determine what the law is, or what the rights of any parties are with reference to any past transaction. It merely requires the certificate of an officer peculiarly conversant with the fiscal affairs of the city that there are or will be available funds, or that available funds may lawfully be provided to meet any proposed expenditure, before the passage of an ordinance or resolution incurring the liability. It is a restriction upon the legislative power of the council, consisting only in a requirement that they must go to the best source of information for the fact upon which their right to act depends. It is easily conceivable that an arbitrary exercise by the auditor of the power so conferred might in particular instances be detrimental to the public interests, but so might the arbitrary exercise of an absolute or qualified veto by the mayor or other executive officer; and, since there is no constitutional objection to the conferring of a veto power upon the mayor, we can see no reason why a similar power with respect to a certain class of legislation may not be conferred upon the auditor of a municipal corporation. But the appellant further contends that, notwithstanding the resolution was passed in the teeth of a prohibitory restriction in the charter, the city is nevertheless bound by the action of the mayor in executing the sublease, because the water company had the right to presume that the council would not have authorized the mayor to act without the proper certificate of the auditor. This proposition, also, we think is unsustained by authority or reason.

It is no doubt true, as was said in *Moore v. Mayor, etc.*, 73 N. Y. 245, 29 Am. Rep. 134, that: "It is indispensable to any government, state or municipal, that full faith and credit be given to the acts of the governing body, and that individuals having occasion to deal with agents of the government should be permitted to regard the acts of the government valid in the absence of any apparent defect, either in the power or the manner of its exercise." And upon this principle it may be conceded

that as to acts *in pais* which cannot appear upon the records of the proceedings, they will be presumed, so far as necessary, to sustain the action of municipal officers in matters falling within their general authority. But this is not a case for the application of the doctrine invoked. The mayor of San Diego had no authority, under the charter or other law of the state, to execute the contract in question. All the authority he had was derived from the resolution of the council, and the water company was bound to know that he could act only in pursuance of authority so conferred. They knew, in other words, that he was, for the purpose of executing that contract, the special agent of the city, and were bound to examine his warrant of attorney. If they had done so, they would have discovered its invalidity by mere inspection, because they must have seen that it did not bear the certificate which the law required to be indorsed upon it. The deficiency here was not merely of an act *in pais*, but was a defect of power, patent on the face of the writing which professed to confer it, and for this reason, also, we are of the opinion that the contract was void.

The further objection by counsel for respondents, that the resolution authorizing the mayor to execute the sublease was nugatory, because the council could only contract by ordinance, need not be noticed further than to say that no authority to proceed by joint resolution in such a matter has been called to our attention, and there is this material difference between the two proceedings, that an ordinance cannot take effect without publication, while a joint resolution is not subject to that condition. The resolution in question does not appear to have been published. The only authority conferred upon the council by the charter "to adopt, enter, and carry out means for securing a supply of water for the use of the city and its inhabitants" is found in the enumeration of matters as to which the council is empowered to pass ordinances. (Stats. 1889, p. 651, sec. 1; p. 653, sec. 29.)

The second ground upon which the superior court held the contract invalid was that it violated section 18, article XI, of the constitution, and the similar provisions of the city charter above quoted.

It was found that the sum of one hundred and ten thousand dollars per year could not have been paid out of the revenue pro-

vided for the city for the year in which the contract was made, or for any subsequent year. But this finding is attacked by the appellant, and the evidence clearly shows, without conflict, that the annual revenue of the city, exclusive of the amount collected from consumers of water, has been largely in excess of one hundred and ten thousand dollars, but that most of it has been expended for other purposes, so that the surplus was very much less than one hundred and ten thousand dollars. But there is nothing to show that the claims upon which the revenues were expended were valid claims, or for the necessary expenses of the city government. For aught that appears, the amount required to pay the rent may have been used to satisfy claims upon contracts entered into subsequent to the date of the lease. It is found, moreover, that a revenue sufficient to pay the necessary expenses of the city government and the rent of the water company could be raised by the levy of a tax not exceeding the charter limit of ninety cents on the hundred dollars.

In view of these findings, the conclusion of the superior court on this point evidently was not based upon the ground that a sufficient revenue to pay the rent could not have been provided year by year without transgressing the limitations of the taxing power imposed by the charter. In fact, it appears from the opinion of the superior judge that his conclusion was based upon a construction of the word "liability" as used in the constitution and charter, according to which a contract, extending over several years and providing for annual payments for services to be rendered or materials to be supplied from year to year, is void if the aggregate amount of all the payments that may become due under the contract from first to last exceeds the revenue of the city provided for the year in which the contract is made. That is to say, he held this lease for twenty years void because the aggregate rent for the whole period, two million two hundred thousand dollars, exceeded the revenues of 1891. This construction of the constitution is not without authority to support it, but most of the cases cited by the learned judge of the superior court in his opinion, and by counsel for respondents in his brief, are considered in the opinion of Justice Henshaw in *McBean v. Fresno*, 112 Cal. 159, 53 Am. St. Rep. 191, where it was held, in accordance with a conflicting line of decisions in other states and in this state, that a contract of a municipal gov-

ernment extending over several years is not rendered invalid by the fact that the aggregate amount to be paid during the whole period is in excess of the income provided for a single year, and that such a contract, so far as this particular objection is concerned, is valid if an income sufficient for the purpose may be provided in each year without exceeding the charter limit of taxation.

The opinion in that case also discusses another objection, which is made in a different form to the contract here in question, viz., that a contract, calling for services or supplies for a number of years beyond the term of office of the members of the council by whom it is made, is void, because it operates as a restraint or suspension of the legislative powers of the council. It is sufficient for our present purposes to say that we approve what was said in *McBean v. Fresno*, *supra*, with respect to this question, as well as the decision therein upon the point last above mentioned.

The remaining objections to the contract are without merit, and do not call for particular notice.

The result of the foregoing discussion is that the contract of the city with the water company is held invalid upon at least two grounds: 1. Because the city was led by the contrivance of the water company to agree to pay, under the name of rent, a subsidy to a railroad; and 2. Because the mayor had not sufficient authority to execute it on the part of the city.

This brings us to the proposition of appellant that, although the contract may have been invalid, the city is nevertheless estopped by its own conduct to deny its validity, at least in so far as it has been executed. The acts of the city most relied upon as creating such estoppel are, in addition to matters already stated, that the city required the water company, in pursuance of the terms of the sublease, to expend more than a hundred thousand dollars in extending its plant for supplying water to consumers, and refused to redeliver possession of the plant when demanded.

It is doubtful if the doctrine contended for by appellant could be sustained without setting aside previous decisions of this court, but this point need not be determined, for none of the decisions of other states go beyond the proposition that a municipal corporation may be estopped to deny the validity of a

contract which it had the general power to make, or to deny the validity of a contract, so far as executed, when the only objection to it is that it is for too long a term. But here one of the principal objections to this contract is that it contains a subsidy to a railroad, and is, therefore, beyond the power of the city and incapable of ratification directly or indirectly.

Our conclusion is, that there can be no recovery upon the express contract, even for the time the city kept possession of the water plant.

But the city had the general power to contract for a water supply for itself and its inhabitants, and under this power could undoubtedly have taken a lease of the water company's plant for a year, and could have renewed such lease from year to year. In effect it has done this very thing. Its express contract to pay nine thousand one hundred and sixty-six dollars and sixty-five cents was invalid for the reasons above stated, but there is no reason why it should not pay the reasonable value of the use of the plant which it has actually enjoyed. The decisions cited by counsel for appellant from the reports of other states very clearly sustain his contention in this respect, and so we think do the decisions of this court. We cite the following: *San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580; opinion of Field, J., in *San Francisco Gas Co. v. San Francisco*, 9 Cal. 469; *Los Angeles Co. v. Los Angeles*, 65 Cal. 476; *Argenti v. San Francisco*, 16 Cal. 276 (opinion of Field, C. J.); *Zottman v. San Francisco*, 20 Cal. 96; 71 Am. Dec. 96.

We think the superior court erred in holding the city not liable on its implied contract to pay the value to it of the use of defendant's plant, as found in the thirty-eighth finding.

Counsel for appellant contends that the city is concluded by the allowance of the bills of the water company for the stipulated rent, and to sustain this proposition cites *San Francisco Gas Light Co. v. Dunn*, *supra*; *McFarland v. McCowen*, 98 Cal. 329, and other cases.

These cases are not in point, because they merely hold that the auditor, in *mandamus* to compel the drawing of his warrant for an allowed claim, cannot question the amount of the allowance. But here the city itself is contesting the claim, and is not precluded from showing that an amount allowed in pursuance of a void contract is in excess of reasonable value.

The claim that the city is liable for damages for withholding possession of the water plant, after demand made for its return, is not supported by any argument, and, since it is not pressed by counsel, we deem it sufficient to say that in view of the findings of the superior court and our conclusions upon the points above discussed, this position is not tenable.

For the reasons above stated, the judgment is reversed, and the cause remanded, with directions to the superior court to enter judgment upon the findings in favor of the water company for the reasonable value to the city of the use of the water company's plant during the time it was actually retained by the city, with authority to take additional evidence if necessary to ascertain the exact sums payable for the different fiscal years, said sums to be made payable out of the revenues of the fiscal years during which they respectively accrued, according to the suggestion made as to the proper form of such judgments in *Weaver v. San Francisco*, 111 Cal. 319.

McFarland, J., Henshaw, J., and Temple, J., concurred.

HARRISON, J., dissenting.—I dissent, and if my duties will permit will hereafter file an opinion expressing the grounds of my dissent.

[No. 19443. In Bank.—October 9, 1897.]

SAN DIEGO WATER COMPANY, Respondent, v. CITY OF
SAN DIEGO et al., Appellants.

WATER RATES—VALIDITY OF MUNICIPAL ORDINANCE—COMPENSATION TO WATER COMPANY—CONSTITUTIONAL LIMITATION.—An ordinance fixing water rates to be collected by a water company supplying water to the inhabitants of a city must allow a just and reasonable compensation to the water company for the property used and the services furnished by it; and if the ordinance allows no compensation or reward therefor, it is invalid, as violating the constitutional limitation that property cannot be taken for public use without just compensation.

Id.—ACTION OF MUNICIPAL BODY NOT A JUDICIAL PROCEEDING.—Whether the fixing of water rates by the governing body of a municipal corporation be called a legislative, a judicial, or an administrative act, it is not an adversary judicial proceeding, such as will conclude or divest private rights, but it is a proceeding on the part of such governing body, to which neither the water company nor the rate-payers are parties, and conducted without notice to them; and though it is, within proper limits, a legitimate exercise of governmental powers, yet when carried so far as to deprive any per-

son or corporation of property without just compensation, it is an unlawful exercise of such power, and is void.

ID.—JURISDICTION OF COURTS—EXTENT OF REVIEW OF MUNICIPAL ACTION—MIXED QUESTION OF LAW AND FACT—EVIDENCE.—The courts have jurisdiction to review the action of the governing body of a municipal corporation in fixing rates for the supply of water to its inhabitants, not as appellate tribunals for the purpose of revising the correctness of its determination, but to the extent of ascertaining whether the rates fixed will allow a reward for the property used and the services furnished by the water company, or whether the power exercised has been carried beyond the constitutional limitation by taking its property for public use without just compensation; and that is a mixed question of law and fact, to be decided by the court upon the evidence produced before it, without reference to the evidence upon which the governing body acted.

ID.—REGULATION OF PUBLIC BUSINESS—POWER TO FIX RATES WITHOUT NOTICE—DUE PROCESS OF LAW.—The business of supplying cities and towns with water is so far public in its nature that the state may impose such conditions and restrictions upon its exercise as may be thought proper, and a water company entering upon that business, under the present constitution, is bound to submit to the conditions and restrictions thereby imposed upon it; and the provision of section 1 of article XIV of the state constitution is not opposed to the constitution of the United States, in that it deprives the water company of its property without due process of law, because not providing that notice shall be given of the fixing of water rates to those whose rights are affected, and for an opportunity for them to appear and defend.

ID.—CONSTRUCTION OF STATE CONSTITUTION—TIME OF ACQUISITION OF RIGHTS IMMATERIAL—REASONABLE RATES—JUST COMPENSATION—REDDRESS FOR ARBITRARY ACTION.—It was not the intention of the framers of the state constitution to distinguish between rights then existing and those to be thereafter acquired in the business of supplying cities and towns with water, nor was it their intention to confiscate private property, but the meaning of the section in regard to the fixing of rates for such business is, that the governing body of the municipality, upon a fair investigation, and with the exercise of judgment and discretion, shall fix reasonable rates and allow just compensation; and if they attempt to act arbitrarily without investigation, or without the exercise of judgment and discretion, or fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty and go beyond the powers conferred upon them, and the court is competent to afford redress therefor.

ID.—BASIS FOR FIXING WATER RATES—VALUATION OF PLANT—COST OF CONSTRUCTION.—In the fixing of water rates, the valuation of the plant is the basic element upon which the investigation rests; and the original cost of construction is simply an element to be considered in fixing the present valuation; and the municipality must fix a fair and just rate for the water based upon the actual value of the plant. [Per Garoutte, J., Temple, J., Harrison, J., and Beatty, O. J.]

ID.—EMINENT DOMAIN—COMPENSATION FOR PROPERTY APPROPRIATED TO PUBLIC USE—REWARD FOR MONEY PROPERLY EXPENDED.—The state has in effect

appropriated the water and plant of the water company to public use, and is bound to provide a just compensation for that use, to be ascertained, not upon the basis of the market value of the property, nor upon what it would cost to replace it, but upon the basis of the revenue that the money reasonably and properly expended in the construction of the works actually in use is capable of producing. [Per Van Fleet, J., Henshaw, J., and McFarland, J.]

ID.—LIMIT OF JUST COMPENSATION—JUDICIAL QUESTION—LOWEST CURRENT RATE OF INTEREST.—The question of just compensation is a judicial question, to be determined in the ordinary course of judicial proceedings; and the water company is entitled to a net compensation at least equal to the lowest current rate of interest on the basic value of its plant, properly ascertained. [Per Van Fleet, J., Henshaw, J., McFarland, J., and Beatty, O. J.]

ID.—POWER OF COURT TO DETERMINE JUST COMPENSATION.—The court has no power to determine any limit of just compensation, but only to inquire whether some compensation, however small, is allowed; and the question of the extent or limit of such compensation is for the municipal body alone to determine. [Per Garoutte, J., Temple, J., and Harrison, J.]

ID.—BONDED DEBT OF WATER COMPANY.—Whether the basis for just compensation to the water company be considered to be the reasonable cost or the actual value of the plant, its bonded indebtedness is to be disregarded in ascertaining such compensation.

ID.—DEPRECIATION OF PLANT BY USE—REPAIRS—SINKING FUND.—In determining the question whether the water company is compensated by the rates established by ordinance, ordinary repairs should be charged to current expense, and substantial reconstruction or replacement should be charged to the cost of construction; but no percentage upon the investment can be charged as a sinking fund, to be added to operating expenses, as a general provision against depreciation of the plant by use.

ID.—COST OF PLANT—FINDING AGAINST EVIDENCE.—The evidence reviewed as to the cost of the plant of the plaintiff water company, and a finding as to such cost, held unsupported by the evidence. [Per Van Fleet, J., Henshaw, J., McFarland, J., and Harrison, J.]

ID.—DUTY OF COUNCIL IN FIXING RATES—PUBLIC INVESTIGATION—NOTICE—RIGHTS OF WATER COMPANY—UNFAIR REFUSAL OF REQUEST.—An investigation by a city council for the purpose of fixing water rates ought to be held publicly, and upon such reasonable notice of the times and places of meetings as will enable those interested to be present; and it is the duty of the council, when requested by the water company, to give it a reasonable opportunity to be heard, not for the purpose merely of presenting its own evidence, but also of explaining or overcoming, if it can, evidence presented by others; and where the right of the water company, upon its request to be present throughout such an investigation and to rebut or overcome evidence adduced against it, was denied by the council and by its committee of investigation, the unfairness in the investigation overcomes the presumption of the correctness of its decision. [Per Van Fleet, J., Henshaw, J., and McFarland, J.]

APPEAL from a judgment of the Superior Court of San Diego County. J. W. McKinley, Judge.

The facts are stated in the opinions of Justices Van Fleet and Garoutte.

William H. Fuller, and Clarence L. Barber, for Appellants.

There can be no relief against water rates fixed by a municipal board except in cases of actual fraud or gross injustice. (*Spring Valley Water Works v. San Francisco*, 82 Cal. 286; 16 Am. St. Rep. 116.) It is not necessary for the board as a body to hear witnesses and examine evidence. (*Bissell v. Jeffersonville*, 24 How. 287, 297; *Collins v. Holyoke*, 146 Mass. 298, 307; *Birdsall v. Clark*, 73 N. Y. 73; 29 Am. Rep. 105; *San Francisco Gaslight Co. v. Dunn*, 62 Cal. 580.) The findings as to cost and operating expenses are against the evidence. The court erred in allowing any percentage for deterioration of the plant. The fixing of rates is a legislative act. (*Sheward v. Citizens' Water Co.*, 90 Cal. 640; *Budd v. New York*, 143 U. S. 517, 545, 546.)

H. E. Doolittle, and T. L. Lewis, also for Appellants

The act of fixing rates is legislative and not judicial. (Const., art. XIV, sec. 1; *Wulzen v. Board of Supervisors*, 101 Cal. 24; 40 Am. St. Rep. 17; *Quinchard v. Board of Trustees*, 113 Cal. 664, 669, 670; *Munn v. Illinois*, 94 U. S. 113; *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 461.) A legislative act will not be interfered with by the courts. (*Paulsen v. Portland*, 149 U. S. 38; *Spring Valley Water Works v. San Francisco*, 82 Cal. 305-07, 314; 16 Am. St. Rep. 116; *Porter v. Haight*, 45 Cal. 639; *Jacobs v. Board of Supervisors*, 100 Cal. 121; *Nisbitt v. Greenwich Board of Works*, L. R. 10 Q. B. 465; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; 24 Am. Rep. 756; *Alpers v. San Francisco*, 32 Fed. Rep. 503; *Wright v. Defrees*, 8 Ind. 298.) The cost of the system cannot be used as a basis for fixing rates, but only its present value. (*Spring Valley Water Works v. San Francisco*, 82 Cal. 286; 16 Am. St. Rep. 116; *San Diego etc. Co v. National City*, 74 Fed. Rep. 79; *Reagan v. Farmers' Loan etc. Co.*, 154 U. S. 412; *Dow v. Beidelman*, 125 U. S.

680; *Ames v. Union Pac. Ry. Co.*, 64 Fed. Rep. 165.) Interest on bonds and maintenance of the plant should be excluded from computation. (*Spring Valley Water Works v. San Francisco*, opinion of Justice Thornton, 82 Cal. 330; *San Diego etc. Co. v. National City*, *supra*.)

Works & Works, for Respondent.

The law of this state concerning water rates violates the constitution of the United States respecting due process of law, in not providing for notice and an opportunity to be heard. (*Chauvin v. Valiton*, 8 Mont. 451; *Stuart v. Palmer*, 74 N. Y. 183, 191; 30 Am. Rep. 289; *Kuntz v. Sumption*, 117 Ind. 1; *Hutson v. Protection Dist.*, 79 Cal. 90; *Railroad Tax Cases*, 13 Fed. Rep. 722, 750; *Ulman v. Mayor*, 72 Md. 587; *Windsor v. McVeigh*, 93 U. S. 274; *Bank of State v. Cooper*, 2 Yerg. 599; 24 Am. Dec. 517, 538, note; *Mercantile Trust Co. v. Texas etc. Ry. Co.*, 51 Fed. Rep. 529; *McMillan v. Anderson*, 95 U. S. 37; *Davidson v. New Orleans*, 96 U. S. 97; *Murray v. Improvement Co.*, 18 How. 272, 276; *People v. O'Brien*, 111 N. Y. 62; 7 Am. St. Rep. 684; *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418; *Richmond etc. Ry. Co. v. Trammel*, 53 Fed. Rep. 196.) The courts have jurisdiction to review and set aside oppressive and unjust action in fixing rates. (*Spring Valley Water Works v. San Francisco*, 82 Cal. 286; 16 Am. St. Rep. 116; *Chicago etc. Ry. Co. v. Minnesota*, *supra*; *Budd v. New York*, 143 U. S. 517; *Pensacola etc. Ry. Co. v. State*, 25 Fla. 310; *San Diego Land etc. Co. v. National City*, 74 Fed. Rep. 83.) Rates should pay operating expenses, interest on bonds, and something in addition. (*Chicago etc. Ry. Co. v. Dey*, 35 Fed. Rep. 866, 879, 880; *Pensacola etc. Ry. Co. v. State*, *supra*; *Ames v. Union Pac. Ry. Co.*, 64 Fed. Rep. 165, 176; *Chicago etc. Ry. Co. v. Dey*, 38 Fed. Rep. 656; *United States v. Workingmen's etc. Council*, 54 Fed. Rep. 994, 995; *Reagan v. Farmers' Loan etc. Co.*, 154 U. S. 362, 390; *Clapp v. Spokane*, 53 Fed. Rep. 515.) The company is entitled to a remuneration upon the capital actually and *bona fide* invested in the plant, corresponding to the ruling rates of interest. (*New Memphis Gas etc. Co. v. Memphis*, 72 Fed. Rep. 952, 955.) A sinking fund should be allowed for depreciation of the plant, as well as for interest on bonds. (*Capital City Gas-light Co. v. Des Moines*, 72 Fed. Rep. 848.)

Trippet & Neale, for Respondent.

Just compensation is required when private property is taken for public use. (Const. art. I, sec. 14.) Money invested by a quasi public corporation is in the nature of a loan to the public for its benefit, for which it is entitled to legal interest as just compensation. (Civ. Code, sec. 1914, et seq.) The courts are bound to relieve against unjust and oppressive rates. (*Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418; *Minneapolis etc. R. R. Co. v. Minnesota*, 134 U. S. 467.) Interest should be based on the original necessary cost of the plant, that being the investment for the public benefit.

John Garber, *Amicus Curiz*, for Respondent.

It is when private property is devoted to public use, or affected with a public interest, that it becomes the subject of regulation. (Tiedeman's Limitations of Police Power, sec. 92; *Budd v. People*, 143 U. S. 548.) A corporation whose property is devoted to public use is entitled to just compensation, of which it cannot be deprived. (*Pensacola etc. Ry. Co. v. State*, 25 Fla. 310; *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418-58; *Reagan v. Farmer's Loan etc. Co.*, 154 U. S. 399; *Ames v. Union Pac. Ry. Co.*, 64 Fed. Rep. 165; *San Diego etc. Co. v. National City*, 74 Fed. Rep. 81.) Property may be taken for public use in the constitutional sense, though title and possession may remain undisturbed. (Lewis on Eminent Domain, sec. 56.) The control of property for the public benefit by regulation of rates is a taking for public use, which requires just compensation from the rates fixed. (See cases cited, *supra*; *Munn v. Illinois*, 94 U. S. 125; *Chicago etc. Ry. Co. v. Dey*, 35 Fed. Rep. 866; 33 Fed. Rep. 656.) The constitutional guarantee for just compensation must have a liberal construction. (*Boyd v. United States*, 116 U. S. 635; Lewis on Eminent Domain, sec. 462.) Profits or earning capacity is a potent factor and controlling as to value of property taken for public use. (*Montgomery Co. v. Schuylkill Bridge Co.*, 110 Pa. St. 59; *Ripley v. Great Northern*, L. R. 10 Ch. App. 435; *Young v. Harrison*, 17 Ga. 30; *Boom Co. v. Patterson*, 98 U. S. 403; *Bridgeman v. Hardwick*, 67 Vt. 653.) The state, by regulation of rates, in effect takes the public use of the property during the period of regulation or from year to year,

and is bound to make the regulated earnings yield a just compensation for the use so taken by a fair interest on the money invested. (*San Diego etc. Co. v. National City, supra; Ames v. Union Pac. Ry. Co., supra; Capital City Gaslight Co. v. Des Moines*, 72 Fed. Rep. 848, 954, 955.) The state has no right to impair the original value of the investment, and should allow legal interest on the capital expended. (Hare's American Constitutional Law, 771.)

S. F. Leib, *Amicus Curiz*, for Respondent.

The constitution requires reasonable rates to be fixed; and the discretion vested in the city authorities has its limits and boundaries within what may be determined on proof to be the limits and boundaries of reasonable rates, just compensation, and due process of law. (Const., art. XIV, sec. 1; art. I, secs. 13, 14.)

VAN FLEET, J.—The plaintiff is a corporation engaged in the business of supplying water to the city of San Diego and its inhabitants. In February, 1890, the common council of the city passed an ordinance fixing the water rates for the year beginning July 1, 1890. In May, 1890, the plaintiff brought this action against the city, the common council, the mayor, and the individual members of the council, to annul this ordinance and enjoin its enforcement. The complaint alleged in substance that the entire revenue which plaintiff could receive during the year in question, under the rates so fixed, would be insufficient to pay its operating expenses and fixed charges for that year, and would, therefore, afford no reward whatever to plaintiff for furnishing the water, and that the ordinance would deprive plaintiff of its property without process of law and without compensation. It was also alleged that, by reason of certain fraudulent practices on the part of the council, the plaintiff was deprived of a fair opportunity to be heard before the council, and prevented from properly presenting its side of the case. The action was tried after the expiration of the year in question, and a judgment was entered declaring the ordinance to be void, and setting the same aside. From this judgment, and from an order denying their motion for a new trial, the defendants appeal.

The findings of the court were in substance: That the prop-

erty and plant of the plaintiff necessary to supply water to the city and its inhabitants actually cost \$750,000; that the reasonable and necessary operating expenses of plaintiff for the year in question, and actually expended by it for that purpose, amounted to \$40,000; that plaintiff was indebted upon its bonds for money borrowed, amounting to the sum of \$1,000,000, bearing interest at the rate of five per cent per annum, of which amount \$750,000 had been necessarily and properly expended for the construction of the plant; that the total receipts of plaintiff for the year in question derived from the rates fixed by said ordinance could not be and were not greater than \$65,788.65; that the annual depreciation of the plant on account of natural decay and use amounted to three and one-third per cent of its value; that no dividends for the stockholders of plaintiff had been or could be earned from the rates fixed by said ordinance for said year; and that the rates so fixed were not just or reasonable.

The court also found certain facts concerning the proceedings of the common council and its committee in investigating the subject matter, which will be noticed hereafter.

These findings are assailed as being in some particulars unsupported by the evidence; and many questions of law have been ably argued by numerous counsel. Some of these questions, though highly interesting and important, are not necessarily involved in this appeal, and we shall therefore not notice them; but we will, so far as space will permit, consider each of the other points made.

1. It is contended by defendants that, under article XIV of the constitution of this state, a court has no power, in the absence of fraud, to hold such an ordinance invalid merely because the court finds the rates fixed thereby to be unjust and unreasonable.

We shall not attempt in this opinion to review the many cases on this subject. It is sufficient to say that the supreme court of the United States (whose decisions on this matter are controlling) has repeatedly decided that the power of the state to fix and regulate the rates of compensation to be charged by persons and corporations in charge of certain public utilities is so limited by the constitution of the United States that it cannot be exercised to such an extent as to require any such person or

corporation to furnish its property or services without reward; and that, if the rates are fixed by legislative power, or otherwise than by appropriate judicial proceedings in which full notice and opportunity to appear and defend are given, it is within the province of the courts to review such action, to the extent, at least, of ascertaining whether the rates so fixed will furnish some reward for the property used and services furnished. To fix rates that will allow no such reward is to take property for public use without just compensation. To this extent at least, then, the court was entitled to go in this case.

But appellants contend that in any event the court could do no more in reviewing the action of the common council than to say whether there was or was not evidence produced before that body sufficient to sustain its conclusions; and that the court was not at liberty to determine the question upon other and perhaps new evidence not produced before the council, nor to substitute its judgment as to the reasonableness of the rates for the judgment of that body. In this contention we think that counsel entirely misconceives the nature of the functions respectively exercised under our constitution by the rate-fixing body and by the courts. Whether the fixing of rates by the council be called a legislative, a judicial, or an administrative act, it is certainly not an adversary judicial proceeding such as, under the constitution, will conclude private rights. It is a proceeding on the part of the government to which neither the water company nor the rate payers are parties, conducted without notice to them, and without any right on their part to effectually intervene. Such a proceeding cannot operate to divest private rights; and, though the supreme court of the United States holds it to be a legitimate exercise of governmental powers, that court also holds that when it is carried so far as to deprive anyone of his property without just compensation it is an unlawful exercise of such power, and simply void. The function of the courts is merely to ascertain whether the power has been carried beyond the constitutional limits so fixed; and, if such be found to be the case, to declare the acts of the council void. They do not sit as appellate tribunals to review the correctness of the council's determination, nor need they know anything about the evidence on which that body has acted. All that they have to consider is, whether, in a given case, the result of the council's ac-

tion will be to take the property of the complaining party without just compensation. That is a mixed question of fact and law, to be decided by the court upon the evidence produced before it.

2. On the other hand, the plaintiff contends that section 1 of article XIV of the constitution of this state is opposed to the constitution of the United States, in that it operates to deprive the water company of its property without due process of law. It is argued that no provision for the fixing of water rates by the tribunal thereby created can be valid without notice to those whose rights are to be affected, and an opportunity to them to appear and defend, the right to which must be given by the constitution itself. That no such notice or hearing is provided for must be admitted; but the consequence contended for does not follow.

In the first place there is nothing in the pleadings or evidence in this case to show that any water rights or property of plaintiff used in furnishing the water in question were acquired before the adoption of the present constitution. On the contrary, we think it substantially appears that they were all acquired since that time. We are unable to perceive why the people of this state in adopting that constitution had not the right to declare that all water not then reduced to private ownership should thereafter remain public, and that thereafter every person undertaking the business of supplying cities or towns or their inhabitants with water should do so upon the condition that the rates to be charged therefor should be conclusively fixed by the state. Such a business is so far public in its very nature that the state might lawfully forbid its exercise by any private individual, and, *a fortiori*, might impose such conditions and restrictions upon its exercise as might be thought proper. If, then, that section of the constitution could be construed as rendering the decision of the council absolutely final and conclusive, plaintiff, at least, could not be heard to complain. If it chose, with that section in force, to enter upon that business, it was bound to submit to the conditions thereby imposed.

But we think that the true construction of that section is such that it is not open to the constitutional objection urged, even if raised by one who at the time of its adoption was engaged in that business. It obviously was not the intention of

the framers of that provision to make any distinction between rights then existing and those to be thereafter acquired, nor can we attribute to them any intention of confiscating private property. The meaning of the section is, that the governing body of the municipality, upon a fair investigation, and with the exercise of judgment and discretion, shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily, without investigation, or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty and go beyond the powers conferred upon them. Such was the conclusion reached by this court in *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116, to which conclusion we adhere. Although that case was decided without the light cast on the subject by later decisions of the supreme court of the United States, and contains some observations which perhaps may require modification, we are satisfied with the correctness of the conclusion there given to this section of the constitution.

According to this construction, the rules announced under the first head in this opinion are applicable. If the council has fixed rates so palpably unreasonable and unjust as to amount to a taking of plaintiff's property without just compensation, it has so far exceeded the powers conferred upon it, and the court is competent to afford redress.

3. This brings us, then, to the question whether the findings support the judgment. They show that the total receipts of the plaintiff from the rates fixed by the council would be and were insufficient to pay plaintiff's actual and necessary operating expenses, together with the interest on so much of its bonded indebtedness as was necessarily and properly expended by it in the construction of its plant, necessarily and actually used for the supplying of the water here in question—indeed, would fall short more than \$11,000 of paying those charges. No circumstances requiring such a loss were found, and the finding that these actual charges were necessarily and properly incurred in the legitimate exercise of the business of furnishing water to the city negative the existence of any such circumstances. It is clear that under the rule laid down by the supreme court of the United States in *Reagan v. Farmers' Loan*

etc. Co., 154 U. S. 362, 412, that court would hold those rates to be so unreasonable and unjust as to require the court to set them aside. The decision in that case, however, is not in all respects satisfactory; and, after a careful examination of all the many cases on this subject, we are unable to discover that any consistent or adequate rules controlling the exercise of the governmental power of fixing rates have yet been judicially laid down. The subject is one of extreme complexity, and its inherent difficulties have been increased rather than diminished by the numerous decisions in which it has been discussed. We think, however, that a consideration of the real nature of the power conferred by our constitution will afford a sufficient solution of the question.

It is apparent that the water company does not own the water which it collects and supplies, or the plant which it uses to collect and distribute that water, in the same sense in which a man is said to own his house or his farm. By the very nature of the use to which it is applied, the company has devoted that property to a public use. Having once undertaken to perform that public duty, it must continue to perform it, and must carry on its business under the lawful regulations of the government. In effect the state may be said to have appropriated the water and the plant to public use. For that appropriation it is bound to make just compensation, and it has provided for such compensation by requiring the municipal authorities to fix just and reasonable rates at which the water is to be furnished to and received by the consumers. Since the state has "taken" the use of this property, it is bound to provide a just compensation for that use, and article XIV of the constitution must be construed as providing for that just compensation.

The question of what is just compensation in such a case is, we think, in all respects analogous to the question which arises in every case of appropriation under the power of eminent domain; and it may be reduced to the formula that the public must pay the actual value of that which it appropriates to the public use. In determining such value three, and we believe only three, methods are possible: 1. Either by ascertaining what the property could be sold for (its market value); or 2. By ascertaining what it would cost to replace it; or 3. By ascertaining the revenue it is capable of producing. In cases like the present,

however, neither the first nor the second method can be resorted to. The judicial test of market value depends upon the fact that the property in question is marketable at a given price, which in turn depends upon the fact that sales of similar property have been and are being made at ascertainable prices. But such property as this is not so sold, at least, not often enough to furnish a fair criterion; and the very fact of governmental regulation would necessarily control the price. Until the rates are fixed no one can say how much the property would sell for, and therefore that price cannot be ascertained as a basis for fixing those rates.

The second method is entirely inapplicable to property of this kind. The construction of municipal waterworks is a matter of growth. It is necessary in common prudence, on the one hand, to construct the works of such capacity as to satisfy the needs of the growing city, not only at the moment, but within the near future; and, on the other hand, not to extend them so much as to cast an unnecessary burden on the stockholders, or the present consumers. As such works are a necessity to the city, they must keep pace with, and to some extent anticipate, its growth. When constructed they stimulate to that extent the progress of the city, and tend, like all conveniences, to lower the general cost of production of all things. It results that at least the first water system in any city occupies the position of a pioneer. At any expense the works must be constructed, and usually no reward can be realized by the constructors until some time has elapsed. In the mean time, as the city grows, in part by reason of this very supply of water, the facility of constructing works of all kinds is increased, and the cost of such construction diminished. It would, therefore, be highly unjust to permit the consumers to avail themselves of the plea that at the present time similar works could be constructed at a less cost, as a pretext for reducing the rates to be paid for the water. The reduced expense, if it be reduced, is due in part at least to the very fact that the city has been provided at the cost of the water company with increased facilities for doing business.

But it is said that those who enter upon any business enterprise undertake the risk of being undersold by those who, coming later into the field, have the advantage of a cheapening of construction. But this is not an ordinary business enterprise.

Those who engage in it put their property entirely into the hands of the public. Having once embarked it is beyond their power to draw back. They must always be ready to supply the public demand, and must take the risk of any falling off in that demand. They cannot convert their property to any other use, however unprofitable the public use may become. They have expended their money for the benefit of others, and subjected it to the control of others. That money has, in effect, been taken by the public; and the public, while refusing to return that money, cannot be heard to say that it no longer has need for all of it.

Nor would it, on the other hand, be just to the consumers to require them to pay an enhanced price for the water, on the ground that it would now cost more to construct similar works. Such a contingency may well happen; but to allow an increase of rates for such reason would be to allow the water company to make a profit, not as a reward for its expenditures and services, but for the fortuitous occurrence of a rise in the price of materials or labor. The law does not intend that this business shall be a speculation in which the water company or the consumers shall respectively win or lose upon the casting of a die, or upon the equally unpredictable fluctuations of the markets. For the money which the company has expended for the public benefit it is to receive a reasonable, and no more than a reasonable, reward. It is to be paid according to what it has done, and not according to what others might conceivably do. In effect, the bargain between the company and the public was made when the works were constructed: and this matter is to be determined according to the state of things at that time.

We must then have recourse to the third standard of value—the revenue which the property is capable of producing. At the first blush there might seem to be a difficulty in applying this standard, for the revenue received by the company will be absolutely controlled by the rates fixed, and no revenue can be collected except upon rates so fixed. This difficulty has led one of the counsel in this case, in a singularly able and ingenious argument, to contend that the rates must be so fixed as to enable the company to obtain precisely the revenue which it would realize if the rates were not regulated by the public at all. To this proposition we cannot assent. The whole history of mu-

municipal regulation conclusively shows that its principal purpose was always to diminish what were rightly or wrongly believed to be exorbitant charges. The theory of its application has always been that it is necessary to restrain the proprietors of what have been called "virtual monopolies" from imposing extravagant and unreasonable tariffs for the use of their facilities. Whether the system be well conceived or not, whether it accords with the theory of free government, are not questions with which we have to do. It is sufficient that the law recognizes that there is a standard by which just compensation may be measured, and that it is intended to prevent that measure from being exceeded.

What that standard is, as applied to the present case, we think not difficult of ascertainment. As we have said, it is not the water or the distributing works which the company may be said to own, and the value of which is to be ascertained. They were acquired and contributed for the use of the public; the public may be said to be the real owner, and the company only the agent of the public to administer their use. What the company has parted with, what the public has acquired, is the money reasonably and properly expended by the company in acquiring its property and constructing its works. The state has taken the use of that money, and it is for that use that it must provide just compensation. What revenue money is capable of producing is a question of fact, and, theoretically at least, susceptible of more or less exact ascertainment. Regard must be had to the nature of the investment, the risk attendant upon it, and the public demand for the product of the enterprise. It would not, of course, be reasonable to allow the company a profit equal to the greatest rate of interest realized upon any kind of investment, nor, on the other hand, to compel it to accept the lowest rate of remuneration which capital ever obtains. Comparison must be made between this business and other kinds of business involving a similar degree of risk, and all the surrounding circumstances must be considered. An important circumstance will always be the rate of interest at which money can be borrowed for investment in such a business; and, where the business appears to be honestly and prudently conducted, the rate which the company would be compelled to pay for borrowed money will furnish a safe, though not always con-

clusive criterion of the rate of profit which will be deemed reasonable. In ordinary cases, where the management is fair and economical, it would be unreasonable to fix the rates so low as to prevent the company from paying interest on borrowed money at the lowest market rate obtainable; and, even then, some allowance or margin should be made for any risk to which the company may be exposed, over and above the risk taken by a lender.

This being so, the existence of the bonded indebtedness on which so much stress has been laid, and which has seemed to present so difficult a problem in some of the cases, must be disregarded. That fact, indeed, it seems to us, can never be important, except as entitling the holders of the bonds, as parties in interest, to be heard in actions like the present. Evidently, no distinction can be made between those who construct the works with their own money and those who do so with money borrowed from others. In either case the money actually invested is the basic criterion of the revenue to be allowed.

It follows that we cannot say that the finding of the court below, that the rates fixed by the city council were less than what was reasonable, is unsupported by the evidence. After deducting current expense for the year—\$40,000—from the revenue received—\$65,788.65—there would be left but \$25,788.65—or but little more than three and one-third per cent upon \$750,000, the actual cost of the works; while the evidence shows that the company was compelled to pay a much higher rate upon money which it appears to have fairly borrowed. It is true that the evidence is not as full and satisfactory on this question as it should be, doubtless owing to the fact that the rules governing this inquiry were not clearly apprehended by the counsel who tried the case. But as no attempt was made to show that the rate of interest paid by the company was above the lowest market rate, and as the prudence and economy of the management were not successfully impeached, we cannot say that the court below was not justified in the conclusion to which it arrived on this question.

But it is contended that the power of the court is at most to inquire whether some reward will be provided by the rates fixed and that if some reward, however small, is so provided, the court cannot interfere. We have been referred to *dicta* in some of the

cases which do support that contention; but we are unable to agree with that conclusion. It is an elementary doctrine of constitutional law that the question of just compensation is a judicial question to be determined in the ordinary course of judicial proceedings; and, construing article XIV of our constitution with section 14 of article I (as we think we are bound to do), we find no difficulty in holding that whenever the rates fixed by the council are grossly and palpably insufficient to furnish such a revenue as will afford just compensation within the rules above declared, redress may be had in the courts. Of course, every slight or conjectural deficiency will not justify an appeal to the courts; nor, if the question be doubtful, will the court, in the absence of fraud or other special ground of equitable interference, substitute its judgment for that of the municipal body. But whenever it is clear and beyond question that the revenue which the company can possibly receive under the rates fixed will be wholly insufficient to allow it the compensation to which it is legally entitled, it is the duty of the court to declare the ordinance void. Such is the case under the findings here, and those findings must, therefore, be held to support the judgment.

It should, of course, be said that it does not follow that in every case the company will be entitled to credit for all of its current expenditures, or to receive a compensation based on the entire cost of its works. Reckless and unnecessary expenditures, not legitimately incurred in the actual collection and distribution of the water furnished, or in the acquisition, construction, or preservation of so much of the plant as is necessary for that purpose, cannot be allowed. Nor can the investment on which the company is entitled to base its compensation be held to include property not now actually employed in collecting or distributing the water now being supplied, however useful it may have been in the past, or may yet be in the future. It is the money reasonably and properly expended in each year in collecting and distributing the water which constitutes the current expenses which may be allowed; and it is the money reasonably and properly expended in the acquisition and construction of the works actually and properly in use for that purpose, which constitutes the investment on which the compensation is to be computed. The amounts stated in the findings in this case are found to be of that character.

4. But it is contended that the findings in several particulars are unsupported by the evidence.

It is claimed that the evidence does not justify the finding that \$750,000 had been actually expended in the purchase and construction of the plant. On this subject the evidence is extremely unsatisfactory. Apart from estimates testified to by engineers, the only evidence of the cost was the books of the company, which placed the amount at \$735,000. Of this sum defendants object to items amounting to about \$127,000, viz., an alleged duplicate of the entry of \$13,932, an alleged overcharge of \$25,000 in the real estate account, and the sum of \$88,000 alleged to be the cost of certain works abandoned and not in use. On these questions we have had little or no assistance from counsel for respondent, and our examination of the evidence has failed to satisfy us on any one of them. The books, or those portions of them brought up in the transcript, require much explanation, which has not been furnished us. In fact, the case appears to have been tried largely on a wrong theory, the greater portion of the evidence consisting of the testimony of expert witnesses as to the value of the property. This is at the best an unsatisfactory way of determining the question of actual cost (for which purpose only could it be admissible), and should not be resorted to when better evidence can be obtained. As against the company, at least, its books furnish better evidence on this subject, and cannot be disregarded. These books certainly show the cost to have been less than \$750,000, though we are unable to determine the precise amount properly shown by them; and the evidence clearly discloses that portions of the plant included in that cost are not now in use, if, indeed, they have not been totally abandoned. We think, therefore, that this finding is not justified by the evidence. On this and kindred matters not only is the burden of proof on the plaintiff, but it is bound to establish them by the most clear and satisfactory evidence, in order to overcome the presumption of the correctness of the action of the city council.

The finding that the expenses of the company for the year in question were \$40,000 is also attacked. The books of the company put the amount at \$44,255.30. Of this amount appellants object to items of about \$5,000 as unnecessary and improper, and object particularly to an item of \$12,800, being an un-

paid bill which is disputed by plaintiff, and on which its liability is left doubtful. Counsel for respondents have not attempted to answer these points. As the evidence is presented to us in an unsatisfactory shape, we will say no more than that it does not support the finding. Whether all of the items complained of are proper or improper cannot be determined upon this record, but some of them are not shown to be proper. It will be the duty of the court on a retrial to allow no item of expenditure which is not satisfactorily shown to be an actual and proper charge in the actual conduct of the business of supplying water; and, when legal or other general expenses are claimed, they must be shown to have had a proper relation to that business. Of course, the items of expenses in the present action should be disregarded. The trial being had after the expiration of the year for which the rates in question were fixed, the amounts of revenue and expenses are capable of exact proof.

With regard to the question of the depreciation of the plant by use, it is sufficient to say that ordinary repairs should be charged to current expense, that substantial reconstruction or replacement should be charged to the construction account, and that depreciation should not otherwise be considered. It is doubtless difficult in many cases to properly discriminate between current and ordinary repairs and such repairs as amount in effect to new construction. Such difficulties, when they arise, must be solved by the application of the principles on which ordinary business enterprises are conducted.

It may be added that when, as appears to have been the case in this instance, portions of the company's expenses are specifically repaid by the consumers, such expenses should be eliminated from the computation. This will apply at least to the "taps" put in for private consumers.

5. Among other things, the court below made the following finding:

"10. That the taking of evidence as to the value of the plaintiff's plant and the rates that should be fixed by the common council of said city, during the month of February, 1890, for the year commencing July 1, 1890, was by said common council delegated to a joint committee consisting of three members from the board of delegates and three members from the board of aldermen of said common council. That said joint committee

proceeded to and did take evidence from the plaintiff and its officers and other witnesses for a number of days, and that on the twenty-first day of February, 1890, the plaintiff then being before said committee by its attorney, said attorney inquired of said committee whether other evidence would be taken, and announced that if other evidence would be taken he, the said attorney, desired to be present, and especially that if evidence was given by members of the board of public works of said city, or estimates were taken from said members of the value or cost of the plaintiff's plant, that he, said attorney, desired to be present and examine said members of the board of public works as to the evidence given by them or the estimates furnished. That it was announced by one of said committee at that time, in the presence of the other members, that he did not know of any other evidence that was to be taken, which was not disputed by any other member of the committee. That there, at that time, and immediately following the demand of said attorney as aforesaid, the city engineer of said city, who was present, was privately and secretly informed that the committee desired to have him present at a meeting to be held the following day to give an estimate of the value of said plant. That on the following day said committee met secretly, and without notifying the water company or its said attorney, and took the testimony of said city engineer and one Schuyler, a member of the board of public works of said city, and took from them their estimates of the value and cost of every part of the distributing system, pumps, wells, and other property of the plaintiff, not including its water rights, rights of way or real estate. That said meeting was held secretly in a back room of the office of the city attorney, while all of the other meetings of the committee had been held publicly in the room of the board of aldermen, was held on a legal holiday when the offices of the city in the City Hall were closed, and said meeting was held with the doors closed and locked. That the plaintiff had no notice or knowledge of said meeting or the taking of said evidence, and was not present either by its officers or its attorney or otherwise, and was given no opportunity to be present or investigate or cross-examine with reference to the evidence given and estimates furnished. That said estimates so furnished were largely less than the cost as proved or estimated by the evidence of the officers

of the plaintiff taken by said committee, and sworn statements furnished by its officers, and the estimates so furnished in the absence of the plaintiff were taken with but few exceptions, and as to small amounts, as the value and cost of said plant by said committee, and made the basis of their report, and of the rates fixed by them and subsequently adopted by the ordinance of the common council. That the report of said committee was made up and concluded on the twenty-fourth day of February, 1890, was presented to both houses of said common council on the evening of that day, and was then adopted by each of said bodies without change. That the attorney of the plaintiff appeared before each of said bodies and demanded that the plaintiff be allowed to offer evidence to said common council, with reference to the fixing of said rates, but his right to offer said evidence was denied, and no evidence was received or heard. That the evidence taken by the committee was taken down by a stenographer and transcribed, but was never read to or submitted to either board of said common council, but that the members of said committee, or some of them, stated their recollection of the evidence upon which their said report was based. That the ordinance mentioned in the complaint, fixing said rates, was passed and adopted by both of the bodies of said common council on the evening of the twenty-fifth day of February, 1890, without any further hearing, or opportunity to be heard, on the part of plaintiff."

It is claimed that this finding is not altogether in accord with the evidence; but, though we find some verbal inaccuracies, we think that in all material particulars it is sufficiently supported.

It is plain that these facts show so much of unfairness in the investigation had by the common council as to overcome the presumption of the correctness of its decision. It was clearly the duty of the council to give to the water company, at least when requested to do so, a reasonable opportunity to be heard, not merely for the purpose of presenting its own evidence, but also of explaining or overcoming, if it could, evidence presented by others. The company, of course, could not claim as a right to be heard at any time it chose; but it certainly was entitled, upon reasonable request for that purpose, to be present when evidence was being produced before the council or its committee, or to be otherwise informed of that evidence and allowed to

overcome it if possible. The action of the committee, for which no sufficient excuse was given, appears to have been taken for the very purpose of excluding the plaintiff when that evidence was received, and it therefore seriously impugns the fairness of the investigation. Indeed, such an investigation ought to be held publicly, and upon such reasonable public notice of the times and places of the meetings as will enable those interested to be present; and a neglect of this precaution, when unexplained, must always give rise to injurious suspicions.

A number of other points have been discussed by counsel, but they are all either covered by what has been said, or have been thereby rendered unimportant.

For the reasons above set forth, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

Henshaw, J., and McFarland, J., concurred.

GAROUTTE, J., concurring.—The findings of fact made by the trial court which are deemed necessary to a consideration of the questions presented before us are as follows: 1. On the twenty-fourth day of February, 1890, and at the time the ordinance mentioned in plaintiff's complaint was enacted by the common council of said city, the water plant and system of the plaintiff was of the value of \$750,000; 2. The necessary operating expenses of plaintiff in conducting its property from July, 1890, to July, 1891, and the sum actually expended, was \$40,000; 3. Plaintiff was and is indebted upon its outstanding bonds regularly issued in the sum of \$1,000,000, bearing interest at five per cent per annum, of which sum \$750,000 was necessarily expended in the construction of the plant, and the interest upon which is \$50,000 per annum; 4. The total receipts received under said ordinance from July 1, 1890, to July 1, 1891, amounted to \$65,788.95, and no more; 5. The annual depreciation of plaintiff's plant is three and one-third per cent per annum; 6. The rates as fixed by the ordinance for the year commencing July 1, 1890, were not just or reasonable, and were grossly oppressive, unjust, and unreasonable.

Owing to the fact that the case was not brought to trial in the lower court until the year had expired covered by the ordinance,

it will be observed that the court was enabled to find the actual receipts to the plaintiff from rate payers during that period. In the discussion of the questions presented by this appeal, we shall assume that the findings of the court, to the effect that the water plant of the plaintiff corporation was of the value of \$750,000, and that its operating expenses for the year would be and were \$40,000, have support in the evidence and stand as facts on the record.

In the fixing of water rates by a city, as contemplated by the constitution, it is evident that the valuation of the plant is the basic element upon which the whole investigation rests. The original cost of construction is simply an item to be considered in fixing the present valuation. It is a circumstance, strong or weak, entering into the final conclusion of the municipality upon the question. But as to the amount of the bonded indebtedness, or the amount of interest annually accruing thereon, we fail to see their materiality in determining the value of the plant, or the sum total of revenue to be raised from the sales of water. It is not a question in which rate payers are concerned, whether the water company has no outstanding indebtedness, or is floundering under a bonded debt which threatens to sink it at any moment. If the municipality is required to establish a scale of rates which will produce a revenue sufficient to pay interest upon outstanding bonds, this provision of the constitution would not only be a perpetual guaranty to the bondholders for the payment of their annual interest, but a constant incentive to additional issues of bonds. Such conditions were never contemplated by anybody. It is the duty of the municipality, when it has arrived at a determination as to the valuation of the plant, to determine the necessary outlay for the ensuing year; then to determine what would be a reasonable, just, and fair compensation to the company, based upon the valuation of the plant, and thereupon to fix a schedule of rates which will produce that sum of money. If there be outstanding bonds, the company may apply its income to the payment of interest thereon. If there be no outstanding bonds, this income may pass to the pockets of the stockholders in the shape of dividends declared. A municipality must fix a fair and just rate for the water, based upon the valuation of the plant, and when it has done this, its duty has been performed, and the revenue collected

under such rates is the property of the company, to do with as it seems best.

Under and pursuant to constitutional authority (Const., art. XIV, secs. 1, 2), the legislature (Stats. 1881, p. 54) passed an act, by the terms of which it was made the duty of the board of supervisors, town council, board of aldermen, or other legislative body, of any city and county, city, or town, in the month of February of each year, to fix the rates which shall be charged and collected by any person, association, company, or corporation for water furnished to any such city and county, or city or town, or the inhabitants thereof. It is now contended by appellant that the authority to fix water rates, coming directly from the constitution to the municipality, the rates fixed under such authority have the same binding force and effect, and occupy the same position as to the law and the courts, and should receive the same consideration as though fixed directly by the legislature, in the absence of the aforesaid constitutional provisions. Let it be conceded, still the claim is unsound that this action of the municipality is conclusive; it is neither above nor beyond the law, and a court of equity will reach out and review it whenever the facts so demand. The legislature itself has no right or power to legislate a man's property away from him, and, beyond doubt, courts are vested with jurisdiction to declare all such attempts void, and will exercise that jurisdiction whenever the occasion presents itself.

The legislature of the state of Minnesota enacted that the rates for freights and fares fixed by the railroad commission of that state should be conclusively presumed to be reasonable. In *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418, this enactment was declared void, as depriving a person of his property without due process of law, the court saying: "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus in substance and effect of the property itself, without due process of law, and in violation of the constitution of the United States; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the law." Again, it is

said in *Stone v. Farmers' Loan etc. Co.*, 116 U. S. 307: "From what has thus been said it is not to be inferred that this power or limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating freights and fares, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation or without due process of law." The same doctrine is also declared in *Georgia etc. Banking Co. v. Smith*, 128 U. S. 174; *Budd v. New York*, 143 U. S. 517; *Reagan v. Farmers' Loan etc. Co.*, 154 U. S. 362; *St. Louis etc. Ry. Co. v. Gill*, 156 U. S. 649. As far as we are given light to see, from the consideration of the doctrine enunciated by the many cases coming from the highest court of the land, it would appear to be immaterial whether this power to fix a schedule of rates is vested in the legislature, or delegated by the legislature to some inferior board or tribunal, or given to such board or tribunal by direct grant from the constitution. Whether it be done by the express act of the legislature, or by council or commission, under authority from a higher power, or whether the act of such council or commission in fixing rates be judicial or legislative, are matters outside the question. If we understand the doctrine declared by the highest judicial tribunal, it is that the courts have no power to declare rates fixed by the body legally authorized so to do unreasonable, unless those rates are so unreasonable and oppressive as to deprive a party of the equal protection of the law, and result in a practical confiscation of his property. And when any attempt is made to despoil the owner of his property, it is the highest duty of a court of equity under the constitution to afford him shelter and protection.

In *Spring Valley Water Works v. San Francisco*, 82 Cal. 306, 16 Am. St. Rep. 116, an exact duplicate of the present question was before this court, and it is there said: "But the courts cannot, after the board has fully and fairly investigated and acted by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be ac-

tual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing." Aside from any question of actual fraud, rates that are so unreasonable and unjust as to deprive the owner of any revenue whatever from his property would amount in law to fraud upon his rights under the constitution. In disposing of appellant's contention that the schedule of rates fixed by the city council is conclusive upon the court, we have also disposed of respondent's contention that the law giving to the city the right to fix water rates is violative of the constitution of the United States, as depriving a man of his property without a hearing before a judicial tribunal. Both positions are equally erroneous.

This court is not here to declare what are reasonable rates. The constitution has vested that power and duty in the council of the city of San Diego, and the exercise of that power by the council cannot be questioned by the courts unless constitutional rights are violated. The question is not, What rate would this court fix if the duty were cast upon it of fixing rates? but rather, Will the owners of the plant be deprived of constitutional rights by an enforcement of the order of the council fixing rates? If the rate fixed by a municipal council was twice too large, I know not what jurisdiction of this court could be invoked to right the wrong. Hence, it is apparent that it is only in exceptional cases that an order fixing rates may be set aside by judicial decree.

Taking the findings of fact as they stand, the schedule of rates fixed by the city should not be disturbed. The valuation of the plant is \$750,000; the operating and current expenses are \$40,000. The revenue from the sale of water under the schedule of rates would be and actually was \$65,000. This leaves a profit of \$25,000 upon the investment. To be sure it is small, when we consider the amount of money invested. To be sure, it is not enough, and possibly not one-half the sum that could be earned if that amount of money was invested in other business undertakings, but with these things we have nothing to do. Those are matters passed upon by the city in the exercise of a discretion granted by the constitution, and its decision as to the reasonableness of the amount of revenue to be derived by the company from the rates is conclusive upon the courts. While this sum is not enough upon this character of investment, still it is three and one-half per cent, and such return is a substantial

profit. We mean it is so substantial that a court of equity, in view of the law of the land, cannot say that the rates are so unreasonable as to be confiscatory in character, and thus violative of any principle of constitutional law.

Mr. Justice Brewer of the supreme court of the United States has probably given this question more thought and investigation than any other jurist in this country, and he says in *Chicago etc. Ry. Co. v. Dey*, 35 Fed. Rep. 866: "Counsel for complainant urge that the lowest rates the legislature may establish must be such as will secure to the owners of the railroad property a profit on their investment at least equal to the lowest current rate of interest, say three per cent. Decisions of the supreme court seem to forbid such a limit to the power of the legislature in respect to that which they apparently recognize as a right of the owners of the railroad property to some reward; and the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the legislature is the sole judge." Subsequently, the same question was again presented to him in *Reagan v. Farmers' Loan etc. Co.*, *supra*, and also in *Ames v. Union Pac. Ry. Co.*, 64 Fed. Rep. 165, and in those cases neither he nor any other of the justices of the supreme court retreated or advanced from that position.

This balance of \$25,000 is profit, unless it is swallowed up by the finding of the court that plaintiff's plant suffered an annual depreciation of three and one-half per cent, and the conclusion of law therefrom that a percentage upon the investment to that amount should be added to the operating expenses before the point is reached where profit begins. We are satisfied that this finding has no support in the evidence, even conceding the conclusion of law drawn therefrom sound. In the first place, the evidence develops that there can be no general depreciation of this plant as a whole. There are tunnels, wells, reservoirs, water rights and real estate, amounting to more than one-half of the valuation of the plant. There is no depreciation of these things; there is no wear and tear, no permanent and gradual destruction by use and age. Most of them stand as everlasting as the hills.

The theory of plaintiff in this regard seems to be that the life of a plant of this character may be approximated at thirty years, and that a sinking fund of one-thirtieth of its value should be collected from the rate payers annually and laid aside to be handed to the stockholders upon the sad occasion of its demise, as an alleviating salve to their sorrow. But such a thing is all wrong, for it results in the consumers of water buying the plant and paying for it in annual installments. Consumers of water cannot be charged with cost of construction. They are only to pay a fair interest upon such cost; and as we look at this matter, if this three and one-half per cent is not stowed away in the vaults as a sinking fund to make glad the hearts of the stockholders upon the expiration of the thirty years, which theory cannot be tolerated for a moment, then it must go into the plant as cost of construction, and, therefore, not chargeable against the consumers. The result of such expenditure is only to increase the valuation of the plant, and to thereby draw from the consumers an income upon the amount of the investment. If improvements are made in the plant, the cost of these improvements should be charged against the construction account. If repairs are made upon the plant as it stands, as, for example, a new pipe substituted for an old piece of the same size and quality, such charge should be considered operating expenses.

Upon an examination of the record we find these views fully corroborated in the evidence of the water company, given by one of its most important witnesses. He testified: "Where we took up one pipe line or a portion of it on the street, and put down another, if it was the same size pipe, to renew it we would charge it to expenses. If it was a different size we would charge the difference between them, the increased size, to construction. Where we sell pipe that we take up, we credit that to construction. If we have to renew any portion of the same size pipe, we charge it to expenses."

This question has arisen incidentally in *Union Pac. R. R. Co. v. United States*, 99 U. S. 402, and also in *Reagan v. Farmers' Loan etc. Co.*, *supra*, but neither case looks the other way from the views we have expressed. When the question arises between the corporation upon the one side and its bondholders or stockholders upon the other, or when it arises upon a construction of a contract with the government, as in one of the cases just cited,

operating expenses, cost of construction, and net earnings may stand upon a different footing. Those cases are not this case. This is neither a question of bookkeeping nor net earnings. The particular system pursued by corporations in segregating and applying their gross receipts is likewise immaterial. The whole matter is a pure question of what is just and right between all parties interested. The consumers of water have rights, and possess equities which must be considered equally with those of the company. They are to be taxed to pay the amount called for by the schedule of rates, and these rates, in justice to them, should be fixed at the smallest possible amount, taking into consideration what is just and equitable to the owners of the property. In cases of the present character under the head of operating expenses the company is entitled to charge for keeping the plant in its normal condition; and the sinking of new wells, the building of new reservoirs, the erection of additional buildings, and the substitution of larger and better pipe (to the extent of the difference), do not come under the head of operating expenses, but should be charged to construction account. If this were not so, a water plant inferior in all things in a few years could be transformed into a water plant superior in everything, at the expense of the consumer. This would be an advantage to the owner and a burden to the rate payer neither contemplated nor justified by the law.

For the foregoing reasons I think the judgment and order should be reversed and the cause remanded.

TEMPLE, J., concurring.—I agree generally in the views expressed by Mr. Justice Garoutte. I do not comprehend how in this case the exercise of the power to regulate charges or to fix compensation for furnishing water is a taking within the meaning of section 14, article I, of the constitution. The waterworks were all constructed subsequent to the adoption of the constitution of 1879. The city owns no waterworks. It is provided in section 19, article XI, of the constitution that any individual or company shall have the use of the streets, for laying down pipes and conduits and making connections therewith, so far as necessary for introducing into and supplying the city and the inhabitants with fresh water, "upon the condition that the municipal government shall have the right to regulate the charges

thereof." The corporation, therefore, constructed its works and invested every dollar of its capital upon this express condition. The privilege of distributing water for pay is a franchise which might have been withheld altogether. It is really a privilege granted to a private individual to perform a public service for pay. It is granted to all upon this express reservation of the right to regulate charges.

Article XIV is the complement to the section before quoted. It declares that the use of all water appropriated for sale or distribution is a public use, subject to the control of the state, and that in cities the "rates or compensation" shall be fixed annually by the governing body of such city, which rates shall continue in force for one year only, and, further, that any individual or company collecting water rates otherwise than as so established shall forfeit his or its franchise and works to the city.

There is here no taking under the power of eminent domain, nor in any other sense than is implied in every service rendered for hire.

There is, then, no obligation to remunerate water companies for investments made or to allow interest thereon, either upon first cost or present value. The obligation is to compensate for service rendered. What will constitute just compensation involves many considerations. Certainly, no allowance need be made for unnecessary expenditures, either in construction or management. Nor is the test always the cost to the companies. There is no limit to the number of companies which may bring water into a city. The franchise is freely offered to all in the constitution. If there are many companies, and thereby the cost of management is increased, this fact would not call for increased rates. The service is worth no more when rendered by ten companies than when one company furnishes all the water. Incidentally to the inquiry as to what is a fair compensation for the service, the governing board may well inquire into the cost which the company whose rates are to be regulated have incurred in bringing water to the city and in distributing it. But these matters are merely incidental and never determinative of the question.

All the elements entering into the question having been determined, opinions would still vary as to what would be fair compensation. The constitution has imposed upon the govern-

ing body of the city the duty of determining that question, and granted the privilege of the streets and the franchise to distribute water upon the express condition that such boards may determine the question. As already shown, the works have been constructed under this express agreement. The court cannot fix the rates—is, in fact, expressly prohibited by the letter of the constitution from so doing. The company will forfeit its franchise and property if it collects rates “otherwise than as so established.” This prohibits them from collecting charges as fixed by the courts. The only proper judicial question is, whether compensating rates have been fixed. Whether they are too high or too low is not a judicial question. The judge cannot substitute his judgment for that of the body to whom the discretion is given by the constitution.

There is much learning upon this subject in the law books, and a great variety of opinions, not to say contrariety, can be found. I know of none which—the facts considered—need be deemed adverse to these views. If there were no such constitutional provisions, the case might be different.

I notice that section 19, article XI, applies only to cities which own no public works. Whether the privilege of using the streets or the right to distribute and sell water exists or can exist in cities which do own such works may be a question. If they do exist, there can be no doubt of the application of article XIV to persons or corporations selling water in such cities. In such cases could the city be compelled to take and pay for other works which only diminish the value of its own property?

HARRISON, J., concurring. I concur in the reversal of the judgment and order of the superior court. In finding the value as well as the cost of the plant the court included many items which were not proper to be considered for that purpose, and which are mentioned in the opinion of Mr. Justice Van Fleet as improperly constituting a part of the cost of the plant. While the cost of the plant may be properly considered as an element of evidence in ascertaining its value, I am clearly of opinion that it should not form the basis of estimating the revenue which the water company is entitled to receive. The value of the plant may change from year to year as materially as may the cost of operating the works, and there is good reason for holding that

the constitution requires the rates to be fixed each year, in order that they may be adjusted to this changing of value. It is not necessary here to lay down a rule which shall be applicable to all conceivable conditions, since the conditions governing in one municipality, or attending the supply of water to its inhabitants, will hardly ever be the same elsewhere, and it is only proper in the present case to consider the circumstances attending the water company and the municipality now before the court.

In designating the city council as the body to fix these rates the constitution has clearly indicated that they are not to be fixed by the courts. The water company has the right to protection by the judiciary from the enforcement of such rates as will deprive it of compensation for furnishing the water; but if the rates fixed by the council afford compensation to the water company, the question of the reasonableness of this compensation is a question of fact which is not open to review by the courts. If the courts are authorized to determine the amount of compensation which will be reasonable, the rates will be fixed by them, rather than by the city council; and, for the same reason, the city council, and not the courts, are authorized to determine whether the rates, to be reasonable, shall be fixed at such amount as will yield to the water company any definite rate of interest.

Even if it should be conceded that reasonable rates would be such as will yield to the water company a return equal to the lowest current rate of interest on the value of its property, it appears from the findings of the court that the rates fixed herein yielded a return of more than three per cent upon the value of the plant, and it is a matter of general notoriety that this is more than is on an average received by capitalists from permanent or fixed investments with the guaranty of the government as their security. What may be the lowest current rate of interest upon an investment depends upon so many circumstances that no particular rate can be predicated in advance of any particular investment, but it is in all instances a question of fact and not of law, and is not to be determined by the judiciary. After it has been determined by the city council, the judiciary are not authorized to set aside its determination on the ground that in its judgment it is too small, any more than it could set aside

the rates on the ground that the income yielded thereby would be too great.

BEATTY, C. J., dissenting.—I think the judgment and order appealed from should be affirmed. In fixing water rates, it is the duty of the city council to provide for a just and reasonable compensation to the water company. Anything short of that is simple confiscation, and is not only a violation of constitutional rights but is an extremely short-sighted policy. Rates ought to be adjusted to the value of the service rendered, and this means that the water companies should be allowed to collect annually a gross income sufficient to pay current expenses, maintain the necessary plant in a state of efficiency, and declare a dividend to stockholders equal to at least the lowest current rates of interest, not on the par or market value of the stock, but on the actual value of the property necessarily used in providing and distributing the water to consumers.

To arrive at the actual value of the plant, water rights, real estate, etc., cost is an element to be considered, but is not conclusive. The plant may have cost too much, it may have been planned upon too liberal a scale, its construction may have been extravagantly managed, the real estate and water rights may have cost less or more than their present value, and, therefore, cost will seldom represent the actual capital at present invested in the works, but such present value is the true basis upon which compensation, in the shape of dividends, is to be allowed.

As to current expenses, all operating expenses reasonably and properly incurred should be allowed, taxes should be allowed, and the cost of current repairs.

In addition to this, if there is any part of the plant, such as main pipes, etc., which at the end of a term of years—twenty years, for instance—will be so decayed and worn out as to require restoration, an annual allowance should be made for a sinking fund sufficient to replace such part of the plant when it is worn out.

In its findings and conclusions the superior court seems to have conformed to these views, and, making every allowance for any minor errors that may appear in the record, the evidence is amply sufficient to sustain every material finding, and the find-

ings clearly sustain the conclusion that in this case the rates fixed were grossly and palpably unjust to the water company.

The judgment and order should be affirmed.

[S. F. No. 963. In Bank.—October 9, 1897.]

HULDA A. RUNDBERG, Petitioner, v. E. A. BELCHER,
Judge, etc., Respondent.

MANDAMUS—INSUFFICIENT PETITION—SUBSTITUTION OF ATTORNEYS—NOTICE OF MOTION—PRESUMPTION.—A petition for a writ of mandate to compel a superior judge to make an order of substitution of attorneys in a cause pending before him, upon the application of the client after notice to the attorney of record, without his consent filed or entered upon the minutes, is insufficient to justify the issuance of the writ, where it does not state or show that written notice of the motion for the substitution was served upon the attorney of record at least five days before the hearing; and, as every intendment is in favor of the regularity and propriety of the order made, it must be presumed, where the contrary is not made to appear, that the court properly exercised its discretion to deny the motion for insufficiency of such notice.

ID.—WRIT, WHEN AND WHEN NOT ALLOWED—JUDICIAL DISCRETION.—While the writ of mandate will lie to compel judicial action, and in some instances even specific action, and is an appropriate remedy, in a proper case, to compel the substitution of attorneys, it may not be invoked to require a judicial officer to act in a particular way, unless it appears by necessary legal deduction from the facts stated that the aggrieved party has been denied a right which it was the plain legal duty of the officer to grant and without his proper discretion to refuse; and, as the requirement of an order of court substituting attorneys upon application of the client involves judicial action, the requirement of a notice as the basis of such order implies at the very least the exercise of sufficient discretion to determine whether the proper notice was given.

ID.—AVERMENT OF CONTINUANCES OF HEARING—APPEARANCE OF ATTORNEY NOT SHOWN.—An averment in the petition for the writ of mandate that the motion for the substitution of attorneys, "after several continuances, came on regularly for hearing," does not supply a defect in the petition in not showing sufficient notice of the hearing, where it is not alleged that the attorney of record appeared at any of the continuances or at the final hearing.

PETITION in the Supreme Court for writ of mandate to Honorable E. A. Belcher, Judge of the Superior Court of the City and County of San Francisco.

The facts are stated in the opinion of the court.

Allen & Allen, for Petitioner.

Edward Lande, and Frank J. Fallon, for Respondent.

VAN FLEET, J.—Application for mandate to require respondent, as judge of the superior court of the city and county of San Francisco, to make an order of substitution of attorneys in a cause pending before him.

The petition does not state facts authorizing the granting of the writ. The only material statements in the petition after the jurisdictional facts are, that on the twenty-fifth day of March, 1897, petitioner, desiring to change her attorneys in the cause pending in the superior court, employed other attorneys to represent her, "and upon her affidavit duly made and filed in said cause, in said superior court, and upon service of a notice of motion, with a copy of the above-mentioned affidavit attached thereto, duly served upon her former attorney, F. J. Fallon, Esquire, for a substitution of counsel for plaintiff in said cause; said motion, after several continuances, came on regularly for hearing on the fourteenth day of May, 1897, before defendant"; and that after a hearing the said motion was denied.

While mandate will lie to compel judicial action, and in some instances even specific action (*Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249) and is an appropriate remedy in a proper case to obtain the relief here sought (*Downer v. Norton*, 16 Cal. 436), it may not be invoked to require a judicial officer to act in a particular way, except it appear by necessary legal deduction from the facts stated that the aggrieved party has been denied a right which it was the plain legal duty of the officer to grant, and without his proper discretion to refuse. (*Wood v. Strother*, *supra*; *Keller v. Hewitt*, 109 Cal. 146.) The petition does not disclose such a case. A substitution or change of attorney may be had under the statute in one of two modes: "1. Upon consent of both client and attorney filed with the clerk or entered upon the minutes; 2. Upon the order of the court upon the application of either client or attorney, after notice from one to the other." (Code Civ. Proc., sec. 285.) It is obviously under the second subdivision of this section that petitioner has sought to proceed in this instance. The requirement of an order of court involves judicial action, and the requirement of a notice

as the basis of such order necessarily implies at the very least the exercise of sufficient discretion to determine that the proper notice has been given. The notice must be in writing and contain a statement of the relief sought, and in this instance was required to be given at least five days before the hearing. (Code Civ. Proc., sec. 1005.) Irrespective of other objections to the sufficiency of the petition, it does not show that such a notice was given. It may be inferred, although it is not alleged, that the notice was in writing, but there is an entire want of any statement of its contents or that it was given for the time required by the statute. It does not appear upon what ground the substitution was denied; it may have been for the very reason that no sufficient notice was given. We have a right, and indeed it is our duty, to presume that such was the fact. Every intendment is in favor of the regularity and propriety of the order made, and, if there is any apparent ground upon which the motion could have been denied, in the exercise of a proper discretion, the writ will not lie. The statement that the motion, "after several continuances, came on regularly for hearing," does not help out the pleading in this respect, since it is not alleged that the opposite party appeared at any of those continuances or at the final hearing.

The writ is denied and the application dismissed.

Harrison, J., McFarland, J., Garoutte, J., and Temple, J., concurred.

[L. A. No. 311. In Bank.—October 9, 1897.]

PATTERSON SPRIGG, Appellant, v. CLARENCE L. BARBER, Respondent.

AMENDMENT OF SETTLED BILL OF EXCEPTIONS OR STATEMENT OF CASE—JURISDICTION OF SUPERIOR COURT—LIMITATION—CONSTRUCTION OF CODE—MOTION IN SUPREME COURT.—The presentation and settlement of a bill of exceptions or statement of the case is a "proceeding," within the provisions of section 473 of the Code of Civil Procedure, an application to amend or correct which, after settlement, is governed by and must be made within the limitation prescribed by that section; and when such application is made in the superior court more than six months from the date of the certificate of settlement, that court is without power to allow an amendment or correction of the bill of

exceptions or statement, and its order denying the application cannot be disturbed upon motion of the appellant in the supreme court to compel such correction.

MOTION in the Supreme Court for an order directing the Superior Court of San Diego County to set aside a settlement of a statement of the case, and to amend the same. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

Withington & Carter, for Appellant.

Haines & Ward, for Respondent.

VAN FLEET, J.—This is a motion by appellant for an order directing the superior court, in which the action was tried, to entertain and hear a motion to vacate and set aside a certificate of allowance and settlement made by the judge of said court on the eleventh day of September, 1896, of a statement on appeal in said action, and to amend such statement by inserting therein and adding thereto certain matter inadvertently omitted by appellant in the statement as proposed by him and settled by the judge.

On June 26, 1897, some nine months after the date of the settlement of said statement, and after the filing of the transcript and briefs in said cause in this court, the appellant made application to the court below to grant him the relief which he now seeks to compel by the present motion, but that court refused to entertain the application and denied the motion upon the ground that it had no jurisdiction, owing to lapse of time, to grant the relief asked. Thereupon the present motion was made in this court.

Whether in any case a plaintiff can, by mere motion, obtain the character of relief here sought, need not be determined, since obviously it cannot be had in this instance. The presentation and settlement of a bill of exceptions or statement of the case is a "proceeding" within the provisions of section 473 of the Code of Civil Procedure, an application to amend or correct which, after settlement, is governed by and must be made within the limitation prescribed by that section. (*Flynn v. Cottle*, 47 Cal. 526; *Branger v. Chevalier*, 9 Cal. 351; Hayne's New Trial and Appeal, sec. 160.)

The application to the court below having been made more than six months from the date of the certificate of settlement, that court was without power to allow an amendment or correction of the statement, and its order denying the application cannot be disturbed.

The motion is denied.

Garoutte, J., Harrison, J., Temple, J., and Beatty, C. J., concurred.

[L. A. No. 193. Department One.—October 9, 1897.]

ALLAN POLLOK, Respondent, v. CITY OF SAN DIEGO,
Appellant.

MUNICIPAL CORPORATIONS—SAN DIEGO—EMPLOYMENT OF SPECIAL COUNSEL.—

Under chapter 5 of the charter of the city of San Diego (Stats. 1889, p. 664), the common council has power to employ special counsel. This power may be exercised either by the joint resolution of the two boards, or by ordinance, since the charter vests the power in the common council, and does not prescribe the mode in which it shall be exercised.

ID.—CERTIFICATE OF AUDITOR—APPROPRIATION OF MONEY—CONSTITUTIONAL

LAW.—The provision of chapter II, section 14, of such charter (Stats. 1889, p. 659), that all ordinances or resolutions appropriating money or incurring indebtedness or liability against the treasury, before being passed, shall have the certificate of the auditor in writing thereon to the effect that such appropriation can be made or indebtedness incurred without the violation of any of the provisions of the charter, is constitutional, and a resolution purporting to incur an indebtedness or create a liability, without such certificate, is void and ineffectual to create a contract.

ID.—ORDINANCE OPERATING AS RESOLUTION.—An ordinance of the city of San

Diego, so certified to by the auditor, providing for the employment of special counsel, and for the payment to him of a retainer, and further compensation to be paid upon the completion of future legal services which might happen within the year, operates as an appropriation of so much of the fund of that year as may be necessary to pay such compensation, and upon being vetoed by the mayor, and not again acted upon by the common council, can have no effect as an ordinance; nor can it be given effect as a joint resolution, because, by subdivision 40 of section 1, chapter 2, of the charter (Stats. 1889, p. 654), the allowance and payment of compensation of special counsel must be by ordinance, and it will be presumed that the common council did not

intend to enter into a contract unless at the same time an appropriation of funds should be made which would enable the city to perform its part thereof.

1D.—ORDINANCE INTRODUCED IN PURSUANCE OF RESOLUTION.—That the common council did not intend the ordinance to operate as a resolution, so as to create a contract for the employment of special counsel, will be further presumed from the fact that the ordinance was introduced in pursuance of a prior resolution providing therefor.

APPEAL from a judgment of the Superior Court of San Diego County. W. L. Pierce, Judge.

The facts are stated in the opinion.

H. E. Doolittle, and T. L. Lewis, for Appellant.

James E. Wadham, and McDonald & McDonald, for Respondent.

HAYNES, C.—The plaintiff, Allan Pollok, as the assignee of J. E. Deakin, an attorney at law, recovered a judgment in the superior court against the city of San Diego for the sum of sixteen hundred and thirty-one dollars and twenty-five cents, found to be a balance due the plaintiff as such assignee for legal services rendered to said city by said Deakin, and from said judgment the city appeals on the judgment-roll.

Appellant's contention is, that the findings do not support the judgment.

The court found that on March 10, 1891, the common council of said city employed Mr. Deakin as its special counsel and attorney in a certain action then pending against the city, by adopting and recording the following joint resolution:

"Resolved, that Mr. Deakin be employed to conduct the case of *San Diego Water Company v. City of San Diego*, and to take sole charge, and that he be paid five hundred dollars retainer, five hundred dollars on completion in superior court, and one thousand dollars additional if taken to supreme court of state. That an ordinance be drawn to that effect, and in case of settlement before going to trial that the five hundred dollars retainer be allowed Mr. Deakin in full payment."

It was further found: "That said joint resolution was never presented to the auditor of said city, and did not have at the time of its passage a certificate of said auditor indorsed thereon or at-

tached thereto; that the liability thereby created against said city could be incurred without the violation of any of the provisions of the charter of said city." That on or about the 17th of March, 1891, the board of aldermen and board of delegates duly passed an ordinance embodying the terms of said resolution; that said ordinance at and before its passage had indorsed thereon a certificate of the auditor dated March 16, 1891, as follows: "I hereby certify that the indebtedness may be incurred without violation of the provisions of the charter, and that the same be paid out of the general fund of 1891."

That said ordinance was vetoed by the mayor and was never repassed by the common council.

That Deakin accepted said employment and took charge of said case, and kept and performed all the duties on his part until on or about January 7, 1893, when defendant notified him that his services were not further required in said action; that Deakin was at all times ready, willing, and able to comply with the terms of said contract, and did not consent to said discharge.

That said action was tried in the superior court in August, 1893, and was appealed to the supreme court in January, 1894; that Deakin was paid five hundred dollars by the defendant in May, 1891, and that there was due and unpaid fifteen hundred dollars and interest from March 5, 1894.

It is contended by appellant that said resolution did not constitute a contract on the part of the city: 1. Because the auditor had not certified that the liability mentioned therein could be incurred without violating any of the provisions of the city charter; and 2. That the resolution itself contemplated further action by the passage of an ordinance to carry into effect the matters mentioned in the resolution; and it is also contended by appellant that the ordinance, though it bore the auditor's certificate, did not constitute a contract nor have any effect for any purpose, because it was vetoed by the mayor and not repassed over his veto.

I have no doubt that the common council has power to employ special counsel, and that this power may be exercised either by the joint resolution of the two boards, or by ordinance, since the charter vests that power in the common council and does not prescribe the mode in which it shall be exercised. That the common council has such power, see chapter 5 of the charter (Stats. 1889, p. 664); and as to the mode in which it may be exercised,

see *Atchison Board of Education v. De Kay*, 148 U. S. 591, 598, and cases there cited.

It is contended by respondent, however, that the provision of the charter requiring the auditor's certificate, above mentioned, is unconstitutional and void, and that, therefore, the resolution of March 10th is valid, and constitutes a contract with Deakin when accepted and acted upon by him.

The validity of said charter provision (Stats. 1889, c. 2, sec. 14, p. 659), requiring the certificate of the auditor before such resolution is passed, was considered in *Higgins v. San Diego*, ante, p. 524. and its validity sustained. Upon a rehearing granted in that case this portion of the opinion has been affirmed, and, upon the authority of that case, the resolution of March 10th must be held void and ineffectual to create a contract.

That the ordinance afterward passed by the council is of no force or effect as such, because vetoed by the mayor and not again passed or acted upon by the common council, is not controverted by respondent; but he contends that conceding its invalidity as an ordinance, that it may nevertheless operate as a joint resolution, and, as the proper certificate was indorsed thereon by the auditor before its passage, it is valid as such joint resolution and constitutes a binding contract.

The argument is, that, as the charter does not provide that joint resolutions shall be approved by the mayor, that his veto can have no operative effect; and as this ordinance "does not make or purport to make an appropriation of money, or 'to allow and order paid' any sum of money, it could properly take effect as a joint resolution."

By subdivision 40 of section 1, chapter 2 of the charter (Stats. 1889, p. 654, "to allow and order paid" the compensation of special counsel must be by ordinance, and cannot exceed in any one fiscal year the sum of five thousand dollars. The supposed contract in this case did not fix definite dates for the different payments, but these, except the first, were to be made upon the happening of certain events which might all have occurred within the year. The ordinance was presented to the auditor as required by the charter, and he certified that the indebtedness could be incurred without violation of the provisions of the charter, "and that the same be paid out of the general fund of 1891."

This certificate, taken in connection with another provision of the charter that: "No expenditure, debt, or liability shall be made, contracted, or incurred during any fiscal year that cannot be paid out of the revenues for such fiscal year," made the ordinance operate as an appropriation of so much of the fund of that year as should be necessary to pay the sums named in the ordinance.

Conceding that an ordinance, such as that here in question, may operate as a contract and also as an appropriation of funds to meet the liability incurred by the contract, it may well be that the common council did not intend to enter into a contract unless at the same time an appropriation of funds should be made which would enable the city to comply with and perform its part of the contract, and that such was the intention of the common council seems reasonably clear.

The common council must have known that a contract to pay for services incurred a liability against the city, and that no resolution which would operate to incur such liability could be passed, so as to become effective, without the auditor's certificate, and such certificate was not applied for or obtained. Besides, the resolution, after specifying the purpose and terms of the proposed employment, directed "that an ordinance be drawn to that effect."

These circumstances justify the conclusion that the common council did not intend to contract by resolution, but did intend to adopt that mode which would not only make a valid contract, but would operate as an appropriation of the necessary funds for its execution and also as an order for its payment as the payments became due. The ordinance, as well as the prior resolution, provided that Deakin should be paid a retainer of five hundred dollars, and without such payment he was not bound to perform any services or to enter in any manner upon the proposed employment; and, as it is conceded that money can only be appropriated or ordered paid by ordinance, the passage of an ordinance was essential to the payment of the retainer; and, as the ordinance was of no effect for want of the mayor's approval, there was no power to make the proposed contract effective, and the acquiescence of the common council in the veto, evidenced by its failure to take further action upon the ordinance, would indicate

its intention to abandon the proposed contract rather than to consider the ineffective ordinance as its joint resolution.

It is true the record shows that the city afterward paid Mr. Deakin five hundred dollars, but it does not appear by what authority it was paid. If subsequent action had been taken by the city authorities authorizing his employment, or which might be held to constitute an affirmance of the alleged contract, it would doubtless have been shown.

Several authorities are cited by respondent, some of them where ordinances are held to operate as or be equivalent to resolutions, and others where resolutions not acted upon by the mayor are held to be sufficient. In only one of these cases was the action of the legislative body of the municipality, which was in the form of an ordinance and which was submitted to and vetoed by the mayor, held operative as a resolution notwithstanding the veto. That was the case of *Jacobs v. Board of Supervisors*, 100 Cal. 121. The others were street improvement cases where the council were required to act by resolution and the action was in the form of an ordinance approved by the mayor, or where the action was in form a resolution and where the contention was that it should have been submitted to and approved by the mayor. It is obvious that in the first class of these cases, as the ordinance contained that which was required to be stated in the resolution, the mere form should not affect its validity, and though the approval of the mayor was unnecessary, it was harmless; while the second class presented the question whether the action of the council in the form of a resolution, and without being presented to the mayor, was sufficient.

In *Jacobs v. Board of Supervisors*, *supra*, the action of the board in fixing water rates was expressly authorized by the constitution to be by resolution or by ordinance. The board passed an ordinance which was vetoed by the mayor. There the duty of fixing water rates was positively enjoined, and was required by the constitution to be performed each year "in the month of February, to take effect on the first day of July thereafter," and for a failure to do so the board was subject to peremptory process to compel action and liable for such penalties as the legislature might prescribe; and it was held that, as the power to fix rates was granted solely to the board, the order was valid notwithstand-

ing the veto. The only other California cases cited by respondent are *Los Angeles v. Waldron*, 65 Cal. 283, and *Hellman v. Shoulters*, 114 Cal. 136, 157. These were both street improvement cases and come within the first class of cases above mentioned. In *Los Angeles v. Waldron*, *supra*, one of the objections to the proceedings to condemn property for street purposes was that it was the duty of the council to do by resolution what it attempted to do by ordinance. This court disposed of the objection by saying: "The latter in our opinion is the equivalent of the former"; and in *Hellman v. Shoulters*, *supra*, under similar facts, the court said: "An ordinance is also a resolution, or, at least so far as this statute is concerned, they are equivalent," and cited the *Waldron* case. In all these cases there was the power to act in some mode, and the intention to act so as to effectuate the purpose in view.

In the case at bar, there was clearly no intention to act by resolution in making the alleged contract, and, as an ordinance was necessary to enable them to perform the contract if one had been made by the resolution, we conclude that when the ordinance was vetoed the common council did not intend to enter into a contract they could not perform without the concurrence of the mayor.

We conclude, therefore, that the evidence does not support the finding that the common council made or entered into a contract to employ Mr. Deakin, and the judgment appealed from should be reversed.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed.

Garoutte, J., Harrison, J., Van Fleet, J.

[Sac. No. 124. Department One.—October 13, 1897.]

**JOHN C. DAVIS, Respondent, v. FIRST NATIONAL BANK
OF FRESNO, Appellant.**

BANKS—DRAFT RECEIVED FOR COLLECTION—NEGLIGENCE.—A bank which receives for collection a draft drawn upon another bank, acts as agent for such collection, and is bound to exercise reasonable care and diligence as well in the employment of its subagents as in the discharge of any other of the duties assumed by it. If, in making the collection, it follows the course usually taken by banks under similar circumstances, it cannot be held to have been negligent.

ID.—IDENTIFICATION OF SIGNATURE OF PAYEE—SENDING DRAFT TO DRAWER—USAGE OF BANKS.—If the payee and his signature were unknown to the collecting bank, and it had no reason to believe that the drawee had knowledge thereof, the question whether or not it was negligent in sending the draft to the drawer for identification is one of fact for the jury; and in an action against the collecting bank to recover the value of the draft on account of its negligence in so sending it, evidence is admissible that the conduct of the bank was in accordance with the usage of banks when making collections of paper presented by persons who were unknown to them.

ID.—KNOWLEDGE OF USAGE.—One who gives a draft to a bank to collect is held to have an implied knowledge of its usage in collecting drafts, so far as such usage does not contravene any rule of law.

ID.—ATTACHMENT OF DRAFT.—If the failure to collect the draft or to return it to the payee was due to its attachment in legal proceeding against the payee, at the place at which it was drawn, such fact would tend to exonerate the collecting bank from negligence, and evidence thereof should have been admitted in the action against it.

ID.—INSTRUCTIONS—NEW TRIAL.—In such an action, where evidence had been given on behalf of the defendant tending to show that it had been authorized by the payee to send the draft to the drawer for identification, an instruction that if the jury found such to be the fact, the defendant was not liable for any loss thereby resulting, and an instruction that "under the evidence there was no need of the defendant forwarding the draft to any place for the purpose of having the signature identified, for it was the duty of the bank upon receiving the draft for collection to have forwarded it for collection to the place where by its terms it was made payable," are conflicting, and the effect of the latter instruction being to neutralize the former, a new trial should be granted.

APPEAL from a judgment of the Superior Court of Fresno County and from an order refusing a new trial. J. R. Webb, Judge.

The facts are stated in the opinion of the court.

George E. Church, and Frank H. Short, for Appellant.

L. L. Cory, for Respondent.

HARRISON, J.—In May, 1893, the plaintiff requested the defendant to cash a draft for seven hundred dollars which had been made on the Fourth National Bank of New York by the First National Bank of Rock Springs, in the state of Wyoming, in favor of Mrs. A. J. Minto, and indorsed by her to him. The plaintiff had arrived in Fresno from the east that morning, and, when asked by the cashier of the defendant if he could be identified by anyone, he replied that he was a stranger in Fresno and knew nobody there. The defendant declined to cash the draft, but offered to take it for collection if he could be identified. He said that he had done business with the bank that had made the draft, and that his signature was with that bank, and was told by the cashier that the draft could be sent there for identification of his signature, and, if found correct, could then be forwarded to New York for collection. The plaintiff said that he thought a draft on New York could be sent for collection without his being identified, but after some discussion, told the cashier: "You know more about it than I do, but I will leave it for collection," and thereupon indorsed the draft and left it with the bank. The defendant sent the draft to Rock Springs for the identification of his signature, but after it was sent it was intercepted by some legal proceedings, the nature of which is not shown by the record, and was not collected or returned to the plaintiff. The present action was brought for the amount of the draft, which the plaintiff charges in his complaint was lost to him by reason of the negligence of the defendant. Judgment was rendered in his favor, and the defendant has appealed.

The basis of the defendant's liability to the plaintiff for its failure to collect the draft is its negligence, and as this was an element in the plaintiff's cause of action, it was incumbent on him to establish it. In making the collection the bank was acting as the agent of the plaintiff, and from the nature of the transaction was required to employ a subagent, and, as the agent of the plaintiff, was bound to exercise reasonable care and diligence, as well in the employ of its subagent as in the discharge of any other of the duties assumed by it. If in making the collection it followed the course usually taken by banks under similar circumstances it cannot be held to have been negligent. (*Dorchester Bank v. New England Bank*, 1 Cush. 177; *Indig v.*

National City Bank, 80 N. Y. 105.) To procure an identification of the plaintiff's signature was under the circumstances a reasonable step to take for the purpose of collecting the draft. It would have been futile for the defendant to send the draft directly to the drawee in New York for collection unless it would itself vouch for the genuineness of the plaintiff's indorsement, for it was not suggested by the plaintiff that the drawee knew his signature, and the drawee would have been authorized to decline payment unless the indorsement was in some mode shown to it to be genuine. The plaintiff was unknown to the defendant, told its officers that he was a stranger in Fresno and knew no one there, and, when told by them that they would not take the draft for collection unless he could be identified, persisted in leaving the draft with them for collection, but gave them no means of identifying him except through his signature with the bank at Rock Springs. Whether under these circumstances, the defendant was negligent in sending the draft to Rock Springs was therefore a question of fact which should have been submitted to the jury. The court, it is true, instructed the jury that: "If, through the negligence and fault of the defendant, the defendant has never returned to the plaintiff the draft handed to it, nor the proceeds thereof, the plaintiff has made out a *prima facie* case of negligence against the defendant." This was, however, only a truism, and did not aid the jury in reaching a verdict. The court should have instructed them with reference to the evidence in the case, and whether, if any of the facts claimed thereby were established, they would constitute such negligence on the part of the defendant as would render it liable.

The court should also have permitted the defendant to show by the witnesses, which it called for that purpose, the usage of banks in regard to the collection of paper presented by persons who were unknown to them, and that the defendant conformed to that usage. (*Warren Bank v. Suffolk Bank*, 10 Cush. 582.) If such usage was reasonable and did not contravene any principles of law, the fact that the defendant followed it would tend to show that it exercised reasonable care in seeking to collect the draft. One who gives a draft to a bank to collect is held to have an implied knowledge of its usage in collecting drafts, so far as such usage does not contravene any rule of law. (Morse

on Banking, sec 9; *Bank of Washington v. Triplett*, 1 Pet. 25.) "The fact that one deals with the bank without taking the trouble to inquire as to its system will raise the implication that he already knows and is satisfied with that system. It is clear that if a person hands over a note to a bank for collection, without any species of remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course and to retain him until the whole theory has been expounded to him, when his conduct unmistakably shows that either he already knows it, or else he does not desire to know it. Either he knows and approves it, or he voluntarily trusts to the wisdom of the bank at his own deliberately assumed risk of its sufficiency. In such a case the bank not only has a right to assume, but it is even positively bound to assume, that his desire is that the ordinary and established usage be pursued." (Morse on Banking, sec. 221.) The plaintiff has cited certain cases in which it has been held negligence *per se* for a bank to send the paper given it for collection directly to the party from whom collection is to be made; but this principle is inapplicable to the present case, as the draft was not sent to the party primarily liable thereon, nor was it sent to the Rock Springs Bank for any other purpose than for the identification of the plaintiff's signature; and it was so sent with the knowledge and implied assent of the plaintiff, for the reason that he was unable to secure his identification in any other mode.

There is some evidence in the record tending to show that the draft was attached at Rock Springs in some proceeding against the plaintiff, the nature of which is not shown, and that an action was brought there by the plaintiff in the name of the defendant to recover the draft. If the failure to collect the draft or to return it to the plaintiff was by virtue of a *jus tertii*, the defendant should have been permitted to show it, as it would tend to exonerate it from negligence.

The court erred in the third instruction which it gave to the jury. The jury were instructed that the ordinary liability of a bank receiving paper for collection might be varied by agreement between the parties, and also that if they found that the draft was sent to Rock Springs for identification of the plaintiff's signature by his consent, the defendant was not liable for any loss thereby resulting. The third instruction of the court,

therefore, that "under the evidence there was no need of the defendant forwarding the draft to any place for the purpose of having the signature identified, for it was the duty of the bank upon receiving the draft for collection to have forwarded it for collection to the place where by its terms it was made payable," neutralized the effect of the other instruction, and prevented the jury from considering the testimony that had been given on behalf of the defendant to the effect that it had been authorized by the plaintiff to send the draft to Rock Springs. We cannot say that if the jury had been allowed to consider this evidence they would not have found that such authorization was given by the plaintiff. If they had so found, their verdict under the other instructions must have been for the defendant.

The judgment and order are reversed and a new trial ordered.

Van Fleet, J., and Beatty, C. J., concurred.

[No. 15899. In Bank.—October 14, 1897.]

UNION TRANSPORTATION COMPANY, Respondent, v. C.
P. BASSETT et al., as Board of State Harbor Commissioners, Respondents

BOARD OF STATE HARBOR COMMISSIONERS—CONTROL OF POSITION OF VESSELS—DISCRETION TO CHANGE PLACE OF LANDING—NONINTERFERENCE OF COURT. The board of state harbor commissioners has power, and has a large discretion vested in it by law, to station, berth, and regulate the position of vessels in the docks and harbor in the bay of San Francisco, and to cause them to remove from time to time, and from place to place, as the general convenience, safety, and good order may require, and if its discretion is honestly exercised to change the place of landing of a vessel, a court of equity cannot interfere with its exercise or substitute the judgment of the court for that of the board, notwithstanding the conclusion of the board may appear erroneous, and the result may work hardship to the owner of the vessel.

1D. — REMOVAL OF STEAMBOAT STATION — INSUFFICIENCY OF WHARF ROOM — FRAUD — INJURY TO BUSINESS — AID OF RIVAL LINE — INJUNCTION — EQUITY JURISDICTION. — Although a court of equity has jurisdiction to enjoin the action of the board of state harbor commissioners in the removal of the place of landing of a vessel, where its action is shown to be characterized by fraud, corruption, improper motives, or influences, plain disregard of duty, or violation of law, yet, in the absence of such showing, where it appears that, in the judgment of the board, the removal of the place of landing of a river steamboat was necessary to relieve the congested condition of traffic, and that the steamboat

was the last vessel placed at the landing from which it was removed, the fact that the removal will produce great and irreparable injury to the business of the steamboat, and will aid a rival line by leaving it in the possession of the field, will not give jurisdiction to a court of equity to enjoin or interfere with the exercise of the discretion of the board to order such removal.

ID.—FRAUD—BURDEN OF PROOF—SUSPICION NOT SUFFICIENT—PRESUMPTIONS.—

Before a court of equity will interfere with the action of the board on the ground of fraud, the plaintiff must clearly establish the fact of fraud, and the proof must amount to more than mere suspicion, which cannot overcome the presumption which is always in favor of the good faith and fair dealing of public officers; and it will be presumed, in the absence of clear proof to the contrary, that the congested condition of the traffic could not have been relieved by other changes of vessels without equally harsh results.

ID.—INADMISSIBLE EVIDENCE—FRAUDULENT REPRESENTATION OF THIRD PERSON

—BRIBERY.—Evidence is not admissible to show that a third person represented to plaintiff that for a specified sum of money he could obtain from the harbor commissioners a rescission of the order of removal, and that the money would be used in "fixing certain parties," in order to prevent the removal, where it was not shown that such third person was in any way connected with the board of state harbor commissioners, nor that any of the board authorized or knew of the proposal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William T. Wallace, Judge.

The facts are stated in the opinion of the court

F. S. Stratton, and Tirey L. Ford, for Appellants.

The exercise of discretion by a public board cannot be interfered with by injunction, in the absence of fraud, though it may be unwise or improvident. (2 High on Injunctions, 964, 965; *Davis v. Mayor etc.*, 1 Duer, 451, 497; *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 306, 308, 309; 16 Am. St. Rep. 116; *McKinley v. Chosen Freeholders*, 29 N. J. Eq. 164; *Argo v. Barthand*, 80 Ind. 66; *Fitzgerald v. Harms*, 92 Ill. 375; *Andrews v. Board of Supervisors etc.*, 70 Ill. 65; *Wiley v. Alleghany County Commrs.*, 51 Md. 401, 404; *Warfel v. Cochran*, 34 Pa. St. 384; *People v. Mayor etc.*, 32 Barb. 113; *Lane v. Morrill*, 51 N. H. 422.) The order of removal having been made by competent authority, there was no infringement of any vested or property right of the plaintiff. (*Knoxville v. Bird*, 12 Lea, 121; 47 Am. Rep. 326; *Salem v. Maynes*, 123 Mass. 374; *Jack-*

sonville v. Ledwith, 22 Am. St. Rep. 582; *Railroad Co. v. Richmond*, 96 U. S. 529; *New Orleans v. Stafford*, 27 La. Ann. 417; 21 Am. Rep. 563.) Evidence to impugn the motives of the board was inadmissible. (*Soon Hing v. Crowley*, 113 U. S. 708; *Ex parte Chin Yan*, 60 Cal. 82; 1 Dillon on Municipal Corporations, 311.)

Pillsbury, Blanding & Hayne, and Reddy, Campbell & Metson, for Respondent.

The action of the board of state harbor commissioners, was unreasonable, oppressive, unjust, and unfair, and tended to create a monopoly in the river traffic, restrain competition in trade, and deprive plaintiff of valuable property rights without due process of law, and should be restrained as invalid and void. (Tiedeman on Police Power, secs. 194, 204; Dillon on Municipal Corporations, sec. 362, and note; *Ex parte Frank*, 52 Cal. 606, 610; 28 Am. Rep. 642; *St. Louis v. Weber*, 44 Mo. 547; *Mayor v. Radecke*, 49 Md. 217; 33 Am. Rep. 239; *Tugman v. Chicago*, 78 Ill. 405; *State v. Loomis*, 115 Mo. 307; *Ritchie v. People*, 155 Ill. 98, 105; 46 Am. St. Rep. 315.) The acts of public bodies, other than the legislature, may be impeached for fraudulent motives. (Dillon on Municipal Corporations, sec. 311; *Spring Valley Water Works v. San Francisco*, 82 Cal. 286; 16 Am. St. Rep. 116; *Davis v. Mayor etc.*, 1 Duer, 451, 498.)

HENSHAW, J.—Appeals from the judgment and from the order denying defendants a new trial. Plaintiff was the owner of a steamboat which plied between the cities of San Francisco and Stockton, carrying produce and passengers. It docked at Clay street wharf in the former city. The defendants, harbor commissioners, by order changed its place of landing to Mission street wharf, whereupon plaintiff instituted this action to enjoin defendants from carrying their order into effect. Plaintiff pleaded that it was engaged in the river trade; that it was essential to the successful conduct of its business, which was principally that of carrying produce, that it should have wharfage facilities at either Clay or Washington street wharves; that the order of removal was arbitrary and made without reason, saving to discriminate against it and in favor of its competitor engaged in the same general business, to prevent it from conducting its business and exercising its rights as a common car-

rier, and utterly to ruin and destroy its business and to render its property useless and valueless. Plaintiff further pleaded that the order of removal, if executed, would bring about these results.

Defendants answered denying these allegations. They pleaded the authority and discretion conferred upon them by law, and averred that the order was made pursuant thereto in good faith, and because in their judgment the public interests and the interests of commerce demanded it.

The court made the following findings:

FINDINGS OF FACT.

"All and singular the allegations contained and set forth in the complaint, and in the amendment to the complaint, at the trial are true in point of fact, and were true at the commencement of the action; the order made by the defendants in the month of August, 1892, purporting to change the docking place and berth room of the plaintiff's boats from Clay street, where they then were, was arbitrary, and was made without any just cause, and without any reason, or notice, or motive therefor on the part of the defendants other than that of injuring and damaging the plaintiff in its transportation business, and to assist others, its rivals and competitors in the business, in forcing the plaintiff to discontinue the running of its said boats; the orders and action of the defendants in and about the removal of the plaintiff's said boats from said Clay street wharf were not made or taken by the defendants for any reason, or upon any ground, or with any intent such as they have alleged in their answer therein, but were made only with the intent and for the purpose on their part as is alleged in the complaint in their behalf."

In accordance with these findings the perpetual injunction prayed for was granted.

At the trial the evidence without substantial conflict disclosed the following facts: At and before the time when plaintiff engaged in river traffic another company (for convenience called the "old line") was operating steamboats between San Francisco and Stockton, with berths at the Washington street wharf, a wharf next to Clay street, upon the north. Plaintiff represented to the harbor commissioners its desire and intention to compete with the old line for the river business, provided its boats could

[shall] set apart and assign suitable wharves, berth, or landings for the exclusive use of vessels." (Pol. Code, sec. 2524.) It will thus be observed that a large discretion is vested by law in the harbor commissioners, a discretion with which, if it be honestly exercised, a court of equity will not feel itself at liberty to interfere, or to substitute its judgment for that of the board, even if the conclusion of the latter should be erroneous and the result work hardship to an individual. The doctrine perhaps cannot be better stated than in the language of Seymour, J., in *Dailey v. New Haven*, 60 Conn. 314: "In the very recent case of *Whitney v. New Haven*, 58 Conn. 450, this court held that whenever bodies like boards of common council are acting within the limits of powers conferred on them, and in due form of law, the right of courts to supervise, review, or restrain is exceedingly limited. With the exercise of discretionary powers courts rarely, and only for grave reasons, interfere. Those grave reasons are found only where fraud, corruption, improper motives or influences, plain disregard of duty, gross abuse of power, or violation of law, enter into or characterize the result. Difference of opinion or judgment is never a sufficient ground for interference." In *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116, this court adopted as a statement of the principle the language of *Davis v. Mayor*, 1 Duer, 451, where it is said: "The meaning and principle of the rule are that the court will not substitute its own judgment for that of the party in whom the discretion is vested, and thus assume to itself a power which the law had given to another; and the limitations to which the principle is subject are that the discretion must be exercised within its proper limits for the purposes for which it was given, and from the motives by which alone those who gave the discretion intended that its exercise should be governed." This citation of authorities might be indefinitely multiplied, but it is sufficient to say that with much uniformity the cases recognize the principle as above given.

But, while courts of equity will not refuse to interfere in proper cases, the showing to justify their interference must be clear. The mere difference of opinion between the chancellor upon the one hand, and the board upon the other, will not suffice. It is not to be expected that power will always be ex-

exercised with the highest discretion, and even in those cases where upon the showing the court would without hesitation declare that, occupying the position of the board, it would not have made the order or passed the ordinance in question, still this reason will not be considered sufficient to justify the substitution by the court of its judgment for that of the tribunal in which the law has seen fit to lodge the power. (*White v. Kent*, 11 Ohio St. 553; *Wiley v. Alleghany County Commrs.*, 51 Md. 404; *St. Louis v. Weber*, 44 Mo. 550; *Knoxville v. Bird*, 12 Lea, 121; 47 Am. Rep. 326.)

Considering the evidence in the light of these principles, it will be noted that in the recital above given two facts are prominent and important: one, that the congested condition of traffic at Clay street wharf necessitated the removal of some boat or boats; the other that the removal of plaintiff's boat subjected its business to great loss, if not to destruction. The specifications in the bill as to the reasons which moved the defendants to the making of the order, and the motives which prompted their conduct, amount to an express charge of fraud and oppression. If this charge be sustained, and if private rights would be infringed by the enforcement of the order, then clearly the plaintiff has shown ground for equitable relief.

It will not be contended that because plaintiff was allowed to dock its boats at Clay street wharf it acquired a vested right to dock there. Nor can it be successfully contended that the order was unreasonable and should not be enforced because plaintiff had contracted with shippers to deliver their produce at Clay street wharf, for plaintiff will conclusively be held to have contracted in view of the right of the harbor commissioners to remove their boats to another landing, if in the fair exercise of a reasonable discretion they should deem it necessary to do so. (*Knoxville v. Bird*, *supra*.) So, also, the fact that the enforcement of the order of removal would injure plaintiff's business and advantage its rival is not in and of itself determinative. "Chances and advantages or disadvantages in trade or business cannot be regulated by judgments of courts." (*Villavaso v. Barthet*, 39 La. Ann. 247.) As was pointed out by this court in the very recent case of *Mutual etc. Light Co. v. Ashworth*, 118 Cal. 1, great individual hardship may result in the execution of discretionary powers, and yet courts of equity be powerless to

grant relief by injunction. If remedies exist for the injuries and oftentimes for the wrongs thus committed they must be enforced by other procedure.

But if, on the other hand, the act will not only result in injury, but is prompted with the design of injuring one and aiding the other company, and that fact is clearly established, the relief prayed for should be granted. Such are the averments here. It is quite true that in most cases fraud and improper motives are proved by indirect evidence. The truth is to be discovered more often from circumstances, from the interest of the parties, from the irregularities of the transaction coupled with injury worked to an innocent party, than from direct and primary evidence of the fraudulent contrivance itself. (*Levy v. Scott*, 115 Cal. 39.) But at the same time, before a court of equity will feel justified in interfering with an act which, save for its fraudulent conception and design, would be an act within the power of the tribunal to execute, the proof must amount to more than a suspicion and clearly establish the fact. In this case the evidence which we have summarized does not, we think, amount to such proof. It may well be argued that, were a court of equity sitting as the board of harbor commissioners, it would have made the order herein as a last resort and only when clearly satisfied that any other change or removal would have resulted in equally great or even greater hardship. But the court may not substitute its judgment for that of the board, and the evidence does not enable us to determine whether other changes might have been made to accomplish the purpose. As the presumption is always in favor of the good faith and fair dealing of public officers, it will be presumed that such changes could not have been made without equally harsh results. While it is made to appear that the McDowell would have been satisfied with another berth, it is not shown that the removal of the McDowell would have relieved the trouble; and the same is true of the Humboldt. Under this view of the evidence, there is thus left nothing (saving as hereafter discussed) upon which to base the court's findings of the fraudulent motives and intent of the commissioners, except the fact that the execution of the order would work to them great injury; but this fact, as has been said, is not determinative upon the question of the improper exercise of a discretionary power.

There is, however, other evidence in the case bearing upon the question of fraudulent motive and which would have been sufficient to support the finding had it been properly admitted in the cause. This was the evidence of certain of plaintiff's officers to the effect that a man had represented to them that for two thousand dollars he could obtain from the harbor commissioners a rescission of the order of removal; that the money would be used in "fixing certain parties" in order to allow plaintiff to remain at Clay street wharf. This evidence was objected to. It was not shown that the man was in any way connected with the defendants, or that any one of them authorized or knew of his proposal. The testimony, if admissible, and if believed by the court, would have a strong tendency to impugn the motives of the commissioners, and upon it alone, as we have said, could the findings of the court in this regard be sustained. But the evidence was so clearly inadmissible that discussion upon the question seems unnecessary. Indeed, its inadmissibility is conceded by respondent, who opposes appellant's objection to it by insisting that its admission was an immaterial error. But that respondent's counsel themselves regard it as material is sufficiently shown by their discussion of this very evidence when in their brief they are considering the proof of fraudulent motive.

The judgment and order are therefore reversed, and the cause remanded.

McFarland, J., Temple, J., Van Fleet, J., Garoutte, J., Harrison, J., and Beatty, C. J., concurred.

[Sac. No. 227. Department One.—October 15, 1897.]

POWELL S. LAWSON, Appellant, v. ADOLPHUS HEWELL
et al., Respondents.

**VOLUNTARY SOCIETIES—DISCIPLINE OF MEMBER OF ROYAL ARCH MASONS—
RULES—IMPROPER SUIT TO RESTRAIN TRIAL—DEMURRER TO COMPLAINT.—**An action will not lie to restrain a voluntary society of Royal Arch Masons from proceeding in accordance with their rules with the trial of a member upon charges of having violated the disciplinary laws of the order, and a complaint in such action which does not charge that the proceedings taken against him are not in accordance with the

rules of the order, or that he has been deprived of any privileges accorded by these rules, and which does not state that the rule which he is charged with violating was not regularly and properly adopted by the grand chapter, and did not receive the approval of a majority of the members of that body, but only charges in general terms that the rule was the result of a conspiracy, and that the charges preferred and the proceedings taken against him are part of the conspiracy, does not state a cause of action, and a demurrer thereto is properly sustained.

ID.—RULES, MATTER OF CONTRACT—DISCIPLINE AGREED UPON—JURISDICTION OF COURTS.—The rules adopted by those who associate themselves in a voluntary fraternal organization, prescribing conditions of membership or of its continuance, and laws of conduct for members, with penalties for their violation, and the tribunal and mode in which the offenses shall be determined and the penalty enforced, constitute their agreement, and, if not contravening some law of the land, are regarded in the same light as the terms of any other contract, and the members must be regarded as having voluntarily submitted themselves by agreement to the disciplinary power of the body in accordance with its rules; and the courts will not interfere unless there is involved the determination of some civil or property right, and then their jurisdiction is limited to inquiring whether the rules prescribed by the organization for the determination of the right have been followed.

ID.—ADOPTION OF RULE BY MAJORITY VOTE—CHARGE OF CONSPIRACY INAPPLICABLE.—It is a misuse of terms to charge that the vote of a majority of the members of a representative body adopting a rule of conduct is the result of a conspiracy; nor can the term "conspiracy" be predicated of the deliberate vote of a governing body.

ID.—POWER AND DISCRETION OF GOVERNING BODY—INTERFERENCE OF COURTS.—The duly chosen and authorized representatives of the members of an order are vested with power and discretion to determine what is for the best interests of the order, and what shall be its internal economy, or whether a change therein is demanded, and the courts have no standard by which to determine the propriety of its rules, nor will they take cognizance of matters arising under and in accordance with them, nor interfere with questions of policy, doctrine, or discipline, nor with the discretion of the governing body, unless there is an arbitrary invasion of private rights.

ID.—REDDRESS OF DISCIPLINED MEMBER—RIGHT OF APPEAL EXCLUSIVE.—Where a disciplined member has received notice of a hearing upon a charge of having violated a rule of the order, and is being tried in accordance with its rules, and has a right of appeal to the grand chapter from any adverse decision at the hearing, so long as he has this right of redress within the order, he has no right to invoke the aid of the courts.

ID.—CONTRACT OF MEMBERS—CHANGE OF RULES.—The contractual relation between the members of a voluntary association is to be determined by a consideration of the entire body of the rules governing the association, and is not limited to those existing at the time of a member becoming such; and unless the rules have placed a limitation upon the power of the association to make any change or amendment therein, any amendment or change adopted in accordance with the

mode provided by the association therefor is binding upon each of the members.

ID.—INSUFFICIENT PLEADING AS TO NEW RULE.—The averment in the complaint by a disciplined member that the attempt to expel the plaintiff is a violation of the contract with him, and that the adoption of the rule under which his expulsion is sought created a new condition in his contract, and was in violation of the constitution and laws of the order, is insufficient, in the absence of averments showing the particulars of the contract of membership, and wherein it will be violated, or the particular provision of the constitution which was violated by the adoption of the rule.

ID.—INTEREST IN PROPERTY INCIDENTAL TO MEMBERSHIP—FORFEITURE OF MEMBERSHIP—JURISDICTION OF COURTS.—The interest of a member in the property of the order accumulated by the payment of annual dues by the members, and his right to participate in its disposition, and to be assisted therefrom in case of need or distress, is merely incidental to his membership, and will cease upon his ceasing to be a member, and does not constitute any such interest in property as will prevent his expulsion, if he has forfeited his right of membership by reason of his conduct, or give to the courts the right to prevent the investigation of the charge, or to determine its sufficiency.

APPEAL from a judgment of the Superior Court of Sacramento County. A. P. Catlin, Judge.

The facts are stated in the opinion of the court.

C. A. Elliott, and Holl & Dunn, for Appellant.

Benefits in a voluntary mutual benefit society constitute the property rights of members, and are subject to the control of the courts. (*Dolan v. Good Samaritan Court, A. O. F.*, 128 Mass. 437; *State v. Nicholas*, 78 Iowa, 747; *Gorman v. Russell*, 14 Cal. 532; 18 Cal. 688; *Robinson v. Exempt Fire Co.*, 103 Cal. 1; 42 Am. St. Rep. 93; *Olery v. Brown*, 51 How. Pr. 92; *Otto v. Journeymen etc. Union, etc.*, 75 Cal. 308; 7 Am. St. Rep. 156.) The relation sustained by plaintiff toward the order of Royal Arch Masons was contractual and governed solely by the laws of contract. (Bacon on Benefit Societies, 2d ed., secs. 28, 37, 91, p. 40; *Hyde v. Wood*, 94 U. S. 523; *Protchett v. Shaeffer*, 11 Phila. 169; *Leech v. Harris*, 2 Brew. 587; *Huston v. Reutlinger*, 91 Ky. 333; 34 Am. St. Rep. 225.) A change or amendment of the contract could not be made without plaintiff's consent. (*Hogan v. Pacific Endowment League*, 99 Cal. 257; *Smith v. Smith*, 3 Desaus. Eq. 557.) Courts of equity will grant relief by injunction in aid of members of unincorporated benevolent associations when unjustly dealt with by the society. (3 Pomeroy's

Equity Jurisprudence, 2073; *Fisher v. Keane*, L. R. 11 Ch. Div. 353; *Lowry v. Read*, 3 Brew. 452; *Leech v. Harris*, *supra*; *Olery v. Brown*, *supra*; Kerr on Injunctions, 562.) Courts will take jurisdiction where the property rights are only incidental to the main object of the organization. (*Gorman v. Russell*, 14 Cal. 532; 18 Cal. 688; *Otto v. Journeymen etc. Union, etc.*, *supra*; *Huston v. Reutlinger*, *supra*; *Metropolitan Baseball Club v. Simmons*, 17 Week. Not. Cas. 153; *Robinson v. Templar Lodge*, 99 Cal. 1; *People v. Musical etc. Union*, 118 N. Y. 1; *Fritz v. Muck*, 62 How. Pr. 69.)

Myrick & Deering, and McKune & George, for Respondents.

The allegations of the complaint as to conspiracy are not admitted by the demurrer. (*Mead v. Stirling*, 62 Conn. 586.) The society must enact and construe its own laws, and enforce its own discipline without interference from the court. (Niblack's Voluntary Societies, secs. 74, 113, 133; *Chase v. Cheney*, 58 Ill. 509; 11 Am. Rep. 95; *Rigby v. Connol*, L. R. 4 Ch. Div. 482; *Burke v. Roper*, 79 Ala. 138; *Supreme Lodge etc. v. Knight*, 117 Ind. 497; *Belton v. Hatch*, 109 N. Y. 594; 4 Am. St. Rep. 495; *Olery v. Brown*, 51 How. Pr. 92; *Hiss v. Bartlett*, 63 Am. Dec. 776; *Black etc. Smith's Soc. v. Vandyke*, 30 Am. Dec. 263; *People v. Board of Trade*, 80 Ill. 134; *Robinson v. Yates City Lodge*, 86 Ill. 598; *State v. Odd Fellows Grand Lodge*, 8 Mo. App. 148.) The power to change rules is incident to the order. (Niblack on Benefit Societies, sec. 114; *Fugure v. Mutual Soc.*, 46 Vt. 369; *Richardson v. Society*, 58 N. H. 189; *Stohr v. Musical Fund Soc.*, 82 Cal. 557; *Supreme Commandery v. Ainsworth*, 71 Ala. 449; 46 Am. Rep. 332; *St. Patrick etc. Soc. v. McVey*, 92 Pa. St. 512; *Lewis v. Wilson*, 121 N. Y. 287; *Supreme Lodge v. Knight*, *supra*.) A member must first exhaust his remedies in the society before he can appeal to the court. (*Mead v. Stirling*, *supra*; *Lafond v. Deems*, 81 N. Y. 508; *White v. Brownell*, 2 Daly, 329; *Osceola Tribe of Red Men v. Schmidt*, 57 Md. 98; *Chamberlain v. Lincoln*, 129 Mass. 70; *Karcher v. Supreme Lodge etc.*, 137 Mass. 368; *Levy v. Magnolia Lodge*, 110 Cal. 297.) The rights of a member in respect of property belonging to the association, are not property interests entitling him to appeal to the courts. (*State v. Odd Fellows Grand*

Lodge, 8 Mo. App. 148; Niblack on Benefit Societies, sec. 126-28; *White v. Brownell*, *supra*.)

HARRISON, J.—The plaintiff has been for many years a member in good standing of Sacramento Chapter No. 3 of Royal Arch Masons, an unincorporated association organized at Sacramento, and one of the subordinate chapters of the grand chapter of Royal Arch Masons of this state. The grand chapter of Royal Arch Masons is the governing body of the subordinate chapters and of the members thereof, and is composed chiefly of representatives from the several subordinate chapters, and has such powers as are granted to it by its constitution and by-laws, rules, regulations, and decisions based upon said constitution. There are two bodies existing and active in this state, known as the Ancient and Accepted Scottish Rite, one of which was organized under the authority of the Supreme Council of the Ancient and Accepted Scottish Rite of the United States of America, their territories and dependencies, commonly known as the United States jurisdiction, and the other is organized under the authority of what is known as the southern jurisdiction of the Ancient and Accepted Scottish Rite. In 1887 the Grand Chapter of Royal Arch Masons adopted a resolution designating certain bodies whose degrees of Masonry and orders of knighthood it acknowledged to be legitimate and genuine, and declared that any Royal Arch Mason who should thereafter take or receive any so-called Masonic degree or order of knighthood from any man or body of men not thus acknowledged to be legitimate and genuine, or who should be present at or assist in conferring, or should solicit anyone to take, receive, or apply for any Masonic degree or order of knighthood except from one of the bodies acknowledged to be legitimate and genuine, should be liable to be expelled from all the rights and privileges of a Royal Arch Mason. In the Masonic bodies thus designated as legitimate and genuine the Ancient and Accepted Scottish Rite, organized under the authority of what is known as the southern jurisdiction, was included, and that organized under the authority of what is known as the United States jurisdiction was excluded.

Section 1 of article XXIV of the constitution of the Grand Chapter of Royal Arch Masons provides that when any member

of a chapter shall be accused of unmasonic conduct, charges to that effect may be preferred in writing by any Royal Arch Mason in good standing, and shall be presented to the high priest of the chapter having jurisdiction thereof, and it is also provided by the rules of the grand chapter that upon the application of said high priest the grand high priest may transfer the trial of the accused from the chapter of which he is a member to some other chapter, whenever in his judgment such transfer is necessary or expedient. In May, 1895, the defendant, Vermilyea, a member of said Sacramento Chapter No. 3, presented a charge in writing against the appellant to the defendant Boyd, who was the high priest of said chapter, charging him with conduct unbecoming a Royal Arch Mason, in that he did in February, 1895, openly solicit another member of said chapter to apply for, take, and receive the so-called degrees in the Ancient and Accepted Scottish Rite claiming its authority under the United States jurisdiction, and also that he was and had for a long time been an active member of a body of Masons claiming to be acting under a charter from the United States jurisdiction of the Ancient and Accepted Scottish Rite. Upon the presentation of these charges, the defendant Boyd forwarded the same to the defendant Hewell, who was the grand high priest of the grand chapter, and that officer directed that the trial of the plaintiff upon these charges be transferred to Stockton chapter, No. 28. Thereupon the plaintiff was summoned by the last-named chapter to appear and answer said charges, and to be tried thereon at its hall in Stockton, on August 5, 1895. The members of said Stockton chapter are also made defendants herein. The present action was brought to restrain the defendants from proceeding with the trial of said charges. A demurrer to the complaint was sustained, and the plaintiff has appealed from the judgment entered thereon.

Individuals who associate themselves in a voluntary fraternal organization may prescribe conditions upon which membership in the association may be acquired, or upon which it may continue, and may also prescribe rules of conduct for themselves during their membership, with penalties for their violation, and the tribunal and mode in which the offenses shall be determined and the penalty enforced. These rules constitute their agreement, and unless they contravene some law

of the land are regarded in the same light as the terms of any other contract. Organizations of this character are not recognized as legal bodies, or as entitled to recognition in courts for the enforcement of their rules, unless there is also involved the determination of some civil right, or some right of property, and in these cases courts are limited to inquiring whether the rules prescribed by the organization for the determination of the right have been followed. In all matters of policy, or of the internal economy of the organization, the rules by which the members have agreed to be governed constitute the charter of their rights, and courts will decline to take cognizance of any matter arising under these rules. Whether the rules have been violated, or whether a member has been guilty of conduct which authorizes an investigation by the association or the imposition of the penalty prescribed by it, is eminently fit for the association itself to determine, and, if the investigation is in accordance with its rules, the party charged has no ground of complaint, since it is but carrying into effect the agreement he made when he became a member of the association. "When men once associate themselves with others as organized bands, professing certain religious views, or holding themselves out as having certain ethical and social objects, and subject themselves to a common discipline, they have voluntarily submitted themselves to the disciplinary power of the body of which they are members, and it is for that society to know its own." (*State v. Odd Fellows' Grand Lodge*, 8 Mo. App. 148. See, also, Niblack on Voluntary Societies, sec 113; *White v. Brownell*, 2 Daly, 329; *Mead v. Sterling*, 62 Conn. 586.)

The plaintiff does not charge in his complaint herein that any of the proceedings taken against him have not been strictly in accordance with the rules prescribed for an investigation of the charges against him, or that he has been deprived of any privilege accorded to him by those rules, but he bases his complaint upon the invalidity of the rule which he is charged with violating. He charges that the adoption of the rule was the result of a conspiracy, and that the charges preferred against him and the proceedings taken for their investigation are a part of this conspiracy, and in furtherance of its objects. It is not charged that the resolutions establishing this rule were not regularly and properly adopted by the grand chapter, or that they did not re-

ceive the approval of a majority of the members of that body; nor is it claimed that since their adoption there has been any attempt to rescind or modify them. These rules were adopted in 1887, and as there have been annual meetings of the grand chapter since that date, composed of individuals chosen therefor in each year by the subordinate chapters, and no change has been made in the rule, it must be assumed that it is the deliberate judgment of that body that the conditions therein named are essential qualifications to entitle anyone to become or remain a Royal Arch Mason. It is a misuse of terms to say that the vote of a majority of the members of a representative body is the result of a conspiracy; nor can the term "conspiracy" be predicated of the deliberate vote of a governing body. The charge, moreover, is made in general terms and without any specifications of fact from which a conspiracy can be inferred, and no fact is alleged with reference to the acts of the defendants who are charged as aiding the conspiracy, other than such as appear to have been done for the purpose of enforcing the rules of the grand chapter. Whether it is for the best interests of the order that its members shall not belong to any other orders than those named in the resolutions adopted by the grand chapter, or whether membership in the Ancient and Accepted Scottish Rite of the United States jurisdiction is contrary to the best interests of Royal Arch Masonry, are questions pertaining solely to the internal economy of the order, and are purely of Masonic cognizance. Courts have no standard by which to determine the propriety of the rule, and are not competent to exercise any function in the matter. "The duly chosen and authorized representatives of the members alone are vested with the power of determining whether a change is demanded, and with their discretion courts cannot interfere. Were it otherwise, courts would control all benevolent associations, all corporations, and all fraternities. It is only when there is an abuse of discretion, and a clear, unreasonable and arbitrary invasion of private rights, that courts will assume jurisdiction over such societies or corporations. With questions of policy, doctrine, or discipline courts will not interfere. Courts will compel adherence to the charter and to the purpose for which the society was organized, but they will not do more." (*Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489.) The proceedings

against the plaintiff are shown by the complaint to have been taken in strict accordance with the rules of the order. He has received notice of the hearing, and he has shown no facts which authorize the conclusion that he will not receive a fair and impartial hearing. From the decision at that hearing he can seek redress by an appeal to the grand chapter. So long as he has this right of redress within the order he has no right to invoke the aid of the courts.

The averment in the complaint that the attempt to expel the plaintiff by reason of his membership in the forbidden order is a violation on the part of the chapter of its contract with him, as well as the averment that the adoption of the rule by the chapter creates a new condition in his contract, and is in violation of the constitution and laws of Royal Arch Masonry, and was in excess of its jurisdiction, are unavailing as an element in his cause of action, in the absence of averments showing the particulars of this contract of membership and wherein it will be violated, or the particular provision of the constitution which was violated by the adoption of the rule. The contractual relation between the association and one of its members is that which exists by virtue of the rules of the association, and so long as the association acts toward him in accordance with these rules there is no violation of this contract. This relation is to be determined, however, by a consideration of the entire body of the rules governing the association, and is not limited to those existing at the time the individual became a member. Unless the rules at that time placed a limitation upon the power of the association to make any change or amendment therein, any amendment or change adopted in accordance with the mode provided by the association therefor is binding upon each of the members.

The plaintiff does not show that any right of property belonging to him will be affected by the proposed action of the chapter. His averments that the chapter, as well as the commandery and council of which he is a member, have accumulated property by reason of the payment by himself and others of certain annual dues fail to show that he has any severable proprietary right to any portion of this property, as against the body of which he is a member, or any right to its use or enjoyment except so long as he shall remain a member of the body. His alle-

gations in this respect are that the property is owned by him "in common with the other members," and that he, "together with the other members," has a right to participate in the use and disposition of said property, and to be assisted therefrom in case of need or distress. His interest in the property thus appears to be only incidental to his membership, and will cease upon his ceasing to be a member. If he has forfeited his right of membership by reason of his conduct, this interest in the property will not prevent his expulsion, or give to courts the right to prevent an investigation of the charge, or themselves to determine its sufficiency.

The demurrer to the complaint was properly sustained, and the judgment is affirmed.

Van Fleet, J., and Beatty, C. J., concurred.

Hearing in Bank denied.

[SAC. No. 126. Department One.—October 15, 1897.]

GEORGE SIMMONS, Respondent, v. DANIEL McCARTHY,
Appellant.

TAXATION—DEED—YEAR OF ASSESSMENT.—Under section 3786 of the Political Code, requiring a tax deed to recite the matters recited in the certificate of sale, and section 3778 requiring the certificate of sale to state "the name of the person assessed, the description of the land sold, the amount paid therefor, and that it was sold for taxes, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed," a tax deed reciting that the property was assessed "in the year 188 , for the year 1888 and 1889," is void for failure to state the year of the assessment.

ID.—STATUTORY REQUIREMENTS—VOID DEED.—Where the statute prescribes the particular form of the tax deed, the form becomes substance, and must be strictly pursued or the deed will be held void, and the courts cannot inquire whether the required recitals are of material facts or otherwise.

ID.—CERTIFICATE OF SALE—EVIDENCE OF TITLE.—Such a deed, when relied on as evidence of title, cannot be aided by reference to the certificate of sale, or by showing that the certificate complied with the statute. It is not even *prima facie* evidence that the title of the owner assessed is impaired, and cannot form the basis of a recovery.

ID.—AMOUNT PAID FOR LAND—RECITALS IN DEED.—A tax deed, reciting that the amount of taxes levied on the property was seven dollars and fifty cents and that the costs and charges which have since accrued

thereon amount to the further sum of one dollar and thirty-seven cents, and also that the purchaser was the bidder who was willing to take the least quantity of the land, and pay the taxes, costs, and charges due thereon, "which taxes, costs, and charges, including fifty cents for certificate of sale, amounted to the sum of eight dollars and eighty-four cents," and that the land was sold to the purchaser, "who paid the full amount of said taxes, costs, and charges," is void, for failure to definitely state the amount paid for the land, it being doubtful therefrom whether the amount paid was eight dollars and eighty-four cents or eight dollars and eighty-seven cents. In such a case the maxim *de minimis* does not apply.

1D.—NOTICE TO REDEEM—AFFIDAVIT—SERVICE ON OCCUPANT.—Under section 3785 of the Political Code, a tax deed issued without an affidavit, showing that the notice of intention to apply for a deed required thereby to be given has been given, is void. Such affidavit must show on its face whether the property was occupied or unoccupied, and, if occupied, that the person upon whom the notice was served was at the time occupying it. A mere recital in the affidavit that the notice was served upon a lessee of the property, without a statement that he was occupying it, is insufficient, and parol evidence is inadmissible, in support of the deed, to show that the lessee was in the occupation thereof at the time of the service.

1D.—FEE DUE FOR NOTICE.—A mere statement in the notice to redeem that three dollars would be due for the notice, without a statement that such sum was a portion of the "amount then due," did not impair its sufficiency.

APPEAL from a judgment of the Superior Court of Siskiyou County and from an order refusing a new trial. J. S. Beard, Judge.

The facts are stated in the opinion of the court.

James F. Lodge, R. S. Taylor, and T. M. Osmont, for Appellant.

James F. Farraher, and Gillis & Tapscott, for Respondent.

HARRISON, J.—The plaintiff brought this action to obtain judgment that he is the owner and entitled to the possession of a certain mining claim in Siskiyou county, and that the adverse claim of the defendant thereto is without right. At the trial of the cause the court admitted in evidence, against the objections of the defendant, a tax deed for the premises in controversy, issued to the plaintiff by the tax collector of the county upon a sale by him for delinquent taxes for the fiscal year commencing July 1, 1888, and it is contended by the defendant upon this appeal that it was erroneously admitted, and by rea-

son of its failure to comply with the requirements of section 3786 of the Political Code should have been excluded by the court.

Section 3786 of the Political Code requires that the tax deed shall recite the matters recited in the certificate of sale, and by section 3776 the certificate of sale must state "the name of the person assessed, the description of the land sold, the amount paid therefor, that it was sold for taxes, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed." The tax deed in question recites: "That said property was assessed according to law in the year A. D. 188 , for the year 1888 and 1889, at five hundred dollars, to Empire Bar Mining Company." The recital in the deed "that said property was assessed in the year 188 ," does not give "the year of the assessment," and is itself without any meaning. Nor is this defect remedied by the subsequent statement that the assessment was "for the year 1888 and 1889," since the statute requires to be given the *year* of assessment; whereas two different years are here given. Where the statute prescribes the particular form of the tax deed the form becomes substance, and must be strictly pursued, or the deed will be held void. And, when a form has been made necessary, it is not for the courts to inquire whether the required recitals are of material facts or otherwise. A special power granted by statute, affecting the rights of individuals, and which divests the title to real estate, ought to be strictly pursued, and it should so appear on the face of the proceedings." (*Grimm v. O'Connell*, 54 Cal. 522.)

Plaintiff also offered in evidence a certificate of sale in which it is recited: "That said property was assessed according to law in the year A. D. 1888, for the year 1889, at five hundred dollars, to Empire Bar Mining Company." The deed, as has been seen, recites that it was assessed "for the year 1888 and 1889." The defect in the deed, however, cannot be aided by a reference to the certificate, or by showing that the certificate complied with the statute. Unless the deed shows on its face a compliance with the requirements of section 3786, it is not even *prima facie* evidence that the title of the owner of the land assessed is impaired, and cannot form the basis of a recovery. In the case last cited it was said: "Plaintiff must recover, if at all, on

his tax deed, supported by evidence of the regularity of the prior proceedings, if the same are attacked. He cannot recover on the tax roll or delinquent list."

The deed is also defective in not stating "the amount paid" for the land sold. It recites that the amount of taxes levied on the property was seven dollars and fifty cents, and that the costs and charges which have since accrued thereon amount to the further sum of one dollar and thirty-seven cents. It also recites that the plaintiff was the bidder who was willing to take the least quantity of said land, and pay the taxes, costs, and charges due thereon, "which taxes, costs, and charges, including fifty cents for the certificate of sale, amounted to the sum of eight dollars and eighty-four cents," and that the land was sold to the plaintiff, "who paid the full amount of the said taxes, costs, and charges." Instead of stating the "amount paid," this amount can be ascertained only by reference to other recitals in the deed, and upon such reference it is left in doubt whether the amount paid was eight dollars and eighty-four cents, as just recited, or whether the amount of eight dollars and eighty-seven cents, recited in a prior portion of the deed, was "the full amount of the taxes, costs, and charges" paid by him. It is not enough to say that the difference is trifling. The maxim *de minimis* has no application in proceedings to transfer title by virtue of statutory proceedings for the enforcement of a tax. (*Treadwell v. Patterson*, 51 Cal. 637.) In such proceedings no requirement of the statute can be disregarded. The amount of the taxes, as well as the amount paid for the land sold, was capable of exact ascertainment, and, when the statute requires this amount to be stated in the deed, an erroneous statement is no better than an entire omission. "The form required becomes substance, and must be strictly pursued or the deed will be held void." (*Grimm v. O'Connell*, *supra*.)

It is recited in the tax deed that the plaintiff, "thirty days prior to the application for a deed, served upon William N. Gott and Empire Bar Mining Company, the occupants of the property purchased," a notice of his intention to apply for a deed, as required by the provisions of section 3785 of the Political Code, and also that he had filed with the tax collector "an affidavit showing that notice has been given to the occupant of the

property" as required by law, and that said affidavit had been filed with the tax collector. The plaintiff also offered in evidence this affidavit and a copy of the notice served by him annexed thereto. The affidavit states: "That on the fourteenth day of March, 1890, he personally served upon William N. Gott, the lessee of the said property, a written notice, of which the foregoing is a copy, by delivering said notice to William N. Gott, in said county." The court then permitted plaintiff to show, against the objections of the defendant, that at the time the notice was served Gott was occupying the mining claim under a lease from the Empire Bar Mining Company.

Section 3785 of the Political Code requires the purchaser at a tax sale to "serve upon the owner of the property purchased, or upon the person occupying the property, if said property is occupied, a written notice" containing certain statements, and declares that "no deed of the property sold at a delinquent tax sale shall be issued by the tax collector, or any other officer, to the purchaser of such property until after such purchaser shall have filed with such tax collector, or other officer, an affidavit showing that the notice hereinbefore required to be given has been given as herein required, which said affidavit shall be filed and preserved by the tax collector as other files, papers, and records kept by him in his office." This provision is a limitation upon the power of the tax collector to issue such deed, and renders void any deed issued by him without requiring a compliance with the provision. The affidavit is the basis upon which the tax collector is to act, and the conditions upon which his power to issue the deed arises must appear by the affidavit. In the language of the section, he cannot issue a deed until after the purchaser shall have filed with him an affidavit "showing that the notice herein required to be given has been given, as herein required." If the affidavit shows that the notice was served upon any person other than the one to whom the property was assessed, it must also show that the person so served was one upon whom the purchaser was authorized to serve the notice.

If the service is not made upon the owner, it must be posted upon the property if it is unoccupied; or, if it is occupied, it must be served upon the person occupying it. It is incumbent, then, upon the purchaser to show by his affidavit whether the

property was occupied or unoccupied, and, if occupied, that the person upon whom the notice was served was at the time occupying it. The tax collector may have personal knowledge that the person upon whom the notice was served was occupying the property, but such knowledge is insufficient to authorize him to issue the deed. The fact must be made to appear by the affidavit, which is to be filed and form a part of the records of his office. The legislature has made this record essential to the transfer of the title to the purchaser, and parol evidence cannot be substituted for the record thus required. In *Hall v. Capps*, 107 Cal. 513, it was held incompetent to show by parol evidence that the premises were unoccupied, and that under an affidavit which showed that the notice had been posted upon the property, without also showing that it was at the time unoccupied, the tax collector had no power to issue the deed, saying: "His power comes not alone from the existence of the facts, but from the proof of their existence, made in the manner specified in the statute, and the mode becomes the measure of his power." As was said in that case, so in the present case may it be said that the very fact stated in the affidavit may be true, and yet the land may have been unoccupied, or the service may not have been made upon the person who was occupying the land. It did not follow, even if Gott were the *lessee* of the property, that he was occupying it, or that it was occupied by anyone; and, as the tax collector could look only to this affidavit for his authority, the recital in his deed that the affidavit showed that the notice had been served upon the occupant was unauthorized, and was overcome by the production of the affidavit itself.

The statement in the notice to redeem, that three dollars would be due for the notice, did not impair its sufficiency. The notice did not purport to state that this was a portion of the "amount then due," as was the case of *Reed v. Lyon*, 96 Cal. 501.

As the judgment must be reversed for the errors in receiving the tax deed and affidavit in evidence, it is unnecessary to consider the other errors which are assigned, as upon a new trial they may not arise or may be obviated.

The judgment and order denying a new trial are reversed and a new trial granted.

Van Fleet, J., concurred.

BEATTY, C. J., concurring.—I concur upon the ground that the affidavit did not show a proper service of the notice to redeem.

[Sac. No. 204. Department One.—October 15, 1897.]

J. M. PUGH, Respondent, v. PORTER BROTHERS COMPANY, Appellant.

SALE OF GOODS BY FACTOR—GUARANTY OF FIXED PRICE—BREACH OF INSTRUCTIONS—MEASURE OF DAMAGES.—In case of a guaranty by a factor that the goods of the principal consigned to him for sale shall yield not less than a fixed price, the breach of his promise renders him liable as a guarantor for the amount which he has promised, irrespective of the value of the goods, or of the price at which he sold them, and the rule that where the factor has been instructed by his principal not to sell the consigned goods below a fixed price, and they are sold below that price, in violation of his instructions, the measure of damages is merely the actual damage or loss sustained by the principal, consisting not of the difference between the selling price and the price fixed by the principal, but of the difference between that price and the actual value of the goods, has no application to a recovery for breach of the contract of guaranty.

ID.—LIABILITY OF FACTOR AS GUARANTOR.—The liability of the factor as a guarantor that the goods shall be sold for not less than a fixed price, becomes absolute upon a sale for cash, or, if upon credit, upon the expiration of the term of credit.

ID.—NEGLIGENCE OF FACTOR—FAILURE TO OBTAIN BEST MARKET PRICE FOR RAISINS—EVIDENCE—MARKET VALUE AT PLACE OF SALE.—Upon the trial of a cause of action based upon the alleged negligence of a factor in failing to obtain the best market price for raisins consigned to him for the purpose of being shipped and sold in Chicago, the market price in Chicago is the basis of the defendant's liability, and their market value at the place of shipment is immaterial, and should not be admitted in proof, where the market value in Chicago can be directly shown, and it is prejudicial error to refuse to permit evidence to be received of what was the market price of raisins in Chicago at the time of sale.

ID.—ORDER NOT TO SELL WITHOUT INSTRUCTIONS—CONVERSION—MEASURE OF DAMAGES.—Where a lot of raisins was to be shipped from Fresno to Chicago and held there by the factor until orders were received from the principal to sell them, a sale by the factor without receiving such orders is a conversion of them, for which their value in Chicago constitutes the measure of damages.

ID.—AVERAGE PRICE OF RAISINS—SHIPMENT AT DIFFERENT DATES—EVIDENCE OF VALUE.—The average price of an average crop of raisins for the entire season is not admissible as evidence of the value of raisins shipped for

sale in Chicago at different dates; and no evidence of any average price of the raisins could affect or vary the liability of the factor as a guarantor of a fixed price; nor could any evidence be received, to measure the liability of the factor for negligence, of any price of raisins antedating their receipt by the factor; but the proper course, in case of shipment of raisins at different dates, is to show the value in the Chicago market of each lot of raisins shipped within a reasonable time after their receipt by the factor to allow of their arrival and sale in Chicago.

ID.—ESTOPPEL—PLEADING—EVIDENCE—RENDITION OF ACCOUNTS—RECEIPT OF PROCEEDS—NEGLIGENCE.—Where no estoppel was pleaded by the defendant, nor any issue of fact of that character submitted to the jury, mere evidence concerning the receipt by the plaintiff and his assignors of the accounts rendered to them by the defendant, and of their receipt of the proceeds of sales as shown by the account cannot be said, as matter of law, to estop them from recovering any damages sustained by reason of the defendant's negligence.

APPEAL from a judgment of the Superior Court of Fresno, County and from an order denying a new trial. J. R. Webb, Judge.

The facts are stated in the opinion of the court.

L. L. Cory, and Wiley J. Tinnin, for Appellant.

Frank H. Short, for Respondent.

HARRISON, J.—The plaintiff is a raisin grower in Fresno county, and the defendant is a corporation engaged in the business of shipping fruits from different points in this state to eastern states and selling them on commission. In 1892 the plaintiff consigned and delivered to the defendant, at Fresno, a quantity of raisins for shipping and sale to his account, and they were shipped by the defendant to Chicago and there sold by it. The defendant rendered an account of its sales to the plaintiff, and, after deducting its advances and the expenses incurred and its commission, paid him the balance. It is claimed by the plaintiff that the defendant, as a consideration for such consignment, guaranteed to him that upon the sale of the raisins it would account and pay to him not less than four and a half cents per pound net. The present action is brought to recover the difference between this amount and the amount received by the plaintiff. The complaint is framed in three counts, one charging the defendant with negligence in the shipment and sales of the

raisins, by which it failed to obtain their value; the second alleging the aforesaid contract of guaranty and its breach, and another for a sale and delivery of the raisins to the defendant at the rate of four and a half cents per pound. At the trial no claim was made under the last count. The plaintiff has also joined in his complaint two other causes of action of the same nature, assigned to him by other shippers—M. B. Silver and A. J. Brooks. A verdict was rendered in favor of the plaintiff, and from the judgment rendered thereon and from an order denying a new trial the defendant has appealed.

There was evidence before the jury tending to show that the defendant made the agreement of guaranty with the plaintiff claimed by him, and also with his assignor, Silver. To the extent, therefore, that the verdict rests upon the implied finding by the jury that such an agreement was made, it must be accepted as correct, and as the defendant does not challenge the correctness of the amount it is unnecessary to consider the effect upon the verdict of not showing that such agreement was made with the plaintiff's assignor, Brooks.

It is contended by the appellant, however, that, notwithstanding such guaranty, it is liable only for negligence in making the sales, and that, even if such negligence be shown, the plaintiff can recover only the difference between the actual value of the raisins at the time they were sold and the amount for which they were sold; that as it appears that the raisins were sold by it for their full value at the time of the sale, the plaintiff has sustained no injury, and consequently is not entitled to any recovery. In support of this contention, several authorities are cited to the effect that where a factor has been instructed by his principal not to sell the consigned goods below a certain price, and in violation of his instructions sells them below that price, the measure of damages is not the difference between the price at which they are sold and the price limited by the consignor, but is the actual damage or loss sustained by the principal; that if in fact the goods were of no greater value than that at which they were sold, the principal has sustained no loss, and can recover no damages from the factor. (*Blot v. Boiceau*, 3 N. Y. 78; *Frothingham v. Evertson*, 12 N. H. 239; *Dalby v. Stearns*, 132 Mass. 230; *Ainsworth v. Portillo*, 13 Ala. 461; *Hinde v. Smith*, 6 Lans. 464; *Nelson*

v. Morgan, 2 Mart., O. S., 256; Mechem on Agency, sec. 1009.) The appellant urges that the same rule of damages must be applied to the breach by the factor of his actual agreement for the guaranty of a fixed price, as by the above authorities is applied to the breach of his implied agreement not to sell the consigned goods for less than the limited price when he accepts them under such instructions. The appellant, however, overlooks the distinction between the two obligations assumed by the factor. The agreement which is implied from receiving the goods under specific instructions only adds another term to his obligation as a factor, and defines the mode in which he is to discharge that obligation, and a breach of this agreement, like any other breach of his duty, entitles his principal to only such damages as he has actually sustained thereby; whereas, in the case of a guaranty of a fixed price, his obligation is that of a promisor, and its breach renders him liable for the amount which he has promised. His position under the guaranty is similar to that which would have arisen had he taken the goods on a *del credere* commission, only that, instead of merely guaranteeing the sales that he may make, he also guarantees that the goods shall be sold for a fixed amount. His liability to his principal for this amount becomes absolute upon a sale for cash, or, if upon credit, upon the expiration of the credit. (*Wolff v. Keppel*, 2 Denio, 368; *Carlwright v. Greene*, 47 Barb. 9; *Swan v. Nesmith*, 7 Pick. 220.) In *Dallon v. Goddard*, 104 Mass. 497, the plaintiffs guaranteed eighty per cent of the invoice price of certain goods consigned to them for sale. The goods were sold for more than this amount, but the expenses and commissions claimed by them would reduce the net proceeds to less than this amount. It was held that the plaintiff took the risk that the goods would yield that amount, and that the defendants were not liable to pay for any charges which would reduce the price to less than the eighty per cent guaranteed. See, also, *Rollins v. Duffy*, 18 Ill. App. 398, where the court held that the contract of the factor could not be construed as a guaranty of a fixed price, but said that if such had been the contract he would have been liable therefor, irrespective of the value of the goods or the price at which he sold them. In *Ex parte White, In re Nevill*, L. R. 6 Ch. App. 397, it was said by Lord Justice Mellish: "If the consignee is at liberty according to the contract between

him and his consignor to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and a fixed time, in my opinion—whatever the parties may think—their relation is not that of principal and agent.”

The plaintiff alleges in his complaint that he delivered the raisins to the defendant as his agent and commission broker, “for the purpose of shipment and sale,” and that defendant “did ship, sell, and dispose of the same”; and the first count in the several causes of action set forth in the complaint is based upon the negligence of the defendant in not obtaining the best market price to be obtained for the raisins. For the purpose of showing the value of the raisins, the court permitted the plaintiff to introduce evidence of their value at Fresno, and ruled that their value at Chicago was inadmissible. In this ruling the court erred. It was never understood between the parties that the defendant was to sell the raisins in Fresno. They were consigned to it to be shipped to the eastern states, and sold by it there, and it was shown that they were in fact shipped and sold by the defendant in Chicago. Hechtman testified that the understanding with the plaintiff was that the raisins were to be shipped to Chicago, and Silver, one of the plaintiff’s assignors, testified: “I understood all these goods had to be sold in the east; that there was no market here for them particularly.” The defendant pleaded in its answer that it had received the raisins from the plaintiff and his assignors only as a factor, to be sold by it on commission for the best market price at which they could be sold, and had accounted therefor to the plaintiff. The defendant was entitled to introduce evidence that was relevant to the issue presented by its defense to the complaint, but whether its liability depended upon its negligence in the sale of the raisins, or its failure to comply with its guaranty of a fixed price, is immaterial so far as the relevancy or materiality of their value in Fresno is concerned. The only capacity in which the plaintiff claims that the defendant received the raisins was to ship them away from Fresno, and to sell them in some foreign market.

Under a consignment to a factor for sale, in the absence of any instruction to the contrary, the residence of the factor, or the place to which the goods are consigned is presumed to be the

place of sale. (*Phillips v. Scott*, 43 Mo. 86; *Phy v. Clark*, 35 Ill. 377; *Kauffman v. Beasley*, 54 Tex. 563; *Grieff v. Cowguill*, 2 Disn. 58.) The factor discharges his obligation to the consignor if he sells the goods at the place of consignment for the market value prevailing at that place. "The correct value cannot be more than the highest price in the market which plaintiff had selected as the best for the sale of his goods." (*Nelson v. Morgan, supra.*)

Inasmuch as the raisins were delivered to the defendant for the purpose of being shipped to Chicago and sold by it there, and were in fact sold by it in Chicago, the market price in Chicago was the basis of the defendant's liability, and the court should not only have permitted the defendant to question the witnesses with reference to their market value in that place, but should not have permitted evidence of their value in Fresno. This ruling of the court that the market price at Chicago was inadmissible was in marked inconsistency with its instruction to the jury that in determining whether the raisins were sold for the best obtainable price they must determine what was the reasonable market price at the place and time of the respective sales, and whether the defendant selected the best time and place to sell the raisins. If the jury should find, as under the evidence they would have been authorized, that Chicago was the proper place for the sale of the raisins, it was unavailing to instruct them to determine the reasonable market price at that place when evidence with reference thereto had been excluded. Nor was this error obviated by the fact that in some of the depositions offered by the defendant evidence was given of the market value at Chicago, since the defendant was entitled to show, not only by witnesses offered on its own behalf, but also by the cross-examination of the witnesses offered on behalf of the plaintiff, that the market value at Chicago was different from what they had stated it to be at Fresno. If, as testified by Silver with reference to his own raisins, they were to be shipped to Chicago and held by the defendant until it received orders from him to sell them, a sale by the defendant without receiving such orders would have been a conversion by it, for which the value in Chicago would have been the measure of damages.

The value of the raisins at Fresno would not be material, unless it tended to prove their value at Chicago, and would be admissible only in case the market value at Chicago could not be directly

shown. It is sometimes held that when there is no market value for a commodity in the place of performance, or if the market in that place is in sympathy with another market, it is competent to show the value at other places in the neighborhood (*Gregory v. McDowell*, 8 Wend. 435); or in a distant market (*Rice v. Manley*, 66 N. Y. 82; *Jones v. Railway*, 53 Ark. 27; Wharton on Evidence, sec. 1290); but when the market value at the place of performance is clear and explicit, such evidence is not competent. (*Durst v. Barton*, 47 N. Y. 167; *Cohen v. Platt*, 69 N. Y. 348.) There was no inability in the present case to show the market value of the raisins in Chicago, nor was it shown that their value there in any respect depended upon their value in Fresno.

Even if the value at Fresno could, under any circumstances, be shown, the court should not have permitted the plaintiff to show the average price of an average crop of raisins for the entire season. The liability of the defendant was either upon its guaranty, or by reason of its breach of duty as a factor or commission merchant. As its guaranty was of a fixed price, it could not be varied by the average price during the season, and its liability as a factor could not arise until after it had received the raisins. The plaintiff testified that October is considered the average time to deliver raisins, and that the first delivery by him was October 10th. The first delivery by Silver was October 17th, and the last November 19th. The first delivery by Brooks was October 22d, and the last November 19th. It was shown that it took about ten days to transport the raisins from Fresno to Chicago. There could be no negligence on the part of the defendant in making a sale until after their arrival at Chicago, and it was shown that the market value was greater in October than at any other time during the season. Silver testified: "I found that the price depreciated very much by the 1st of November, and from that time it was in a very low condition. I know that on or about the 1st of November the raisin market in Chicago became demoralized, and raisins became worth a very low price. I know that raisins sold in November and December brought a very much lower price than those sold earlier." Another witness testified that the prices were higher during the first and middle of October than they were afterward. All the testimony tended to show a declining market after the 1st of November. As the greater portion of

the raisins were delivered to the defendant after the 1st of November, defendant could not be held liable for their value in October, and even if under any circumstances the average price could be the measure of its liability, it could only be the average of the prices after the time it became liable. It would be manifestly unjust to include a price higher than at any time for which it was liable, as an element in determining such average. As the defendant could be liable only after its receipt of the raisins, the proper course would have been to show the value within a reasonable time after such receipt.

The evidence concerning the receipt by the plaintiff and his assignors of the accounts rendered them by the defendant, and of their receipt of the proceeds of sales as shown by these accounts, cannot be said, as matter of law, to estop them from recovering from the defendant any damages sustained by reason of its negligence. No estoppel was pleaded by the defendant, nor was any issue of fact of this character submitted to the jury.

The judgment and order are reversed and a new trial ordered.

Van Fleet, J., and Beatty, C. J., concurred.

[Sac. No. 122. Department One.—October 16, 1897.]

CHARLES W. POMEROY et al., Respondents, v. HENRY H.
BELL et al., Appellants.

VENDOR AND VENDEE—CONTRACT FOR PURCHASE—POSSESSION BY VENDEE—IMPROVEMENTS.—A vendee who takes possession of land, by virtue of the terms of an optional and executory contract for its purchase, does not enter as a tenant within the meaning of section 1019 of the Civil Code. His entry is by reason of the estate in the land which he claims in himself, and the improvements which he makes thereon are made in contemplation of his becoming the owner, and if permanently affixed to the land become a part of the realty as fully as if he were the absolute owner. Such improvements belong to the vendor in case the vendee subsequently declines to comply with his contract of purchase, and the vendee has no right to remove them from the land.

CONTINUANCE OF TRIAL.—The court has the right to impose costs, other than those properly taxable, as a condition for postponing the trial, and to proceed therewith upon the refusal of the party applying for the postponement to comply therewith.

APPEAL from a judgment of the Superior Court of Calaveras County and from an order refusing a new trial. C. V. Gottschalk, Judge.

The facts are stated in the opinion of the court.

F. William Reade, and Frank M. Stone, for Appellants.

F. J. Solinsky, and Reddick & Solinsky, for Respondents.

HARRISON, J.—In April, 1894, the defendant, Bell, entered upon certain lands in the county of Calaveras owned by the plaintiffs and took possession thereof, with their consent, for the purpose of prospecting for gold and mineral ores, under a written agreement, by the terms of which he had the option of purchasing the land for the sum of thirty-five thousand dollars, payable at a future designated day, and while so in possession placed thereon, and permanently affixed to the land, certain buildings, machinery, and fixtures. In September of the same year, and prior to the expiration of the time within which the purchase was to be completed, the defendants commenced to remove from the land the property that had thus been placed upon it. Plaintiffs thereupon commenced the present action to restrain them from so doing. The cause was tried by the court and judgment rendered in favor of the plaintiffs, in accordance with their complaint. The defendants have appealed therefrom, and also from an order denying their motion for a new trial.

The court finds that all of the property placed upon the land by the defendant Bell was permanently attached and affixed to the land, and that it was so affixed by him without any agreement with the plaintiffs, or either of them, permitting him to remove any portion of the same. The property thus became a part of the land (Civ. Code, secs. 658-61), and under the provisions of section 1013 of the Civil Code belonged to the plaintiffs. It is, however, contended by the appellants that Bell was a tenant at will of the plaintiffs, and that the property affixed to the land was in the nature of trade fixtures, and that by virtue of section 1019 of the Civil Code, he was entitled to remove it. Section 1019 is as follows: "A tenant may remove from the demised premises any time during the continuance of his term anything affixed thereto for the purposes of trade, manufacture, or

nament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises."

One who enters into possession of land under an executory agreement for its purchase does not thereby become the tenant of the vendor, and is not liable for the use and occupation of the premises. "An executory contract for the sale of land, which gives the purchaser a right to enter and possess the premises until default in payment of the purchase money, does not establish the relation of landlord and tenant where there is no reservation of rent fixed in the contract." (12 Am. & Eng. Ency. of Law, 662, and cases cited.) "Nor will the relation of landlord and tenant be inferred from occupation, if the relative position of the parties to each other can, under all the circumstances of the case, be referred to any other distinct cause. As, for instance, between a vendor and vendee of land, where the purchaser is to have possession until the agreement for purchase is completed or rescinded; for possession was evidently taken in such case with the understanding of both parties that the occupant should be owner, and not tenant." (Taylor on Landlord and Tenant, sec. 25.)

In the absence of any terms in the agreement limiting the time for such occupation, the right of the occupant is a bare license which is determinable at the will of the vendor; and when, by the terms of the agreement, he has the right to occupy the premises until the expiration of the time within which his purchase is to be completed, his occupancy is not permissive, but is by virtue of the contract under which he is to become the owner, and by which he is in equity held to be the owner. (*Willis v. Wozencraft*, 22 Cal. 616.) Until the expiration of the time limited for the completion of the contract, and so long as the contract remains in full force, he cannot be compelled to surrender the possession, or to pay for the use and occupation of the premises. Upon a rescission of the contract, or upon default on the part of the vendee in complying with its terms, he is sometimes termed a *quasi* tenant at will, for the purpose of recovering possession by the vendor. His entry having been lawful, and not for any definite term, or with any liability for rent, he has been held in some cases entitled to a demand for possession before his holding can be deemed unlawful. (*Blum v. Robertson*, 24

Cal. 145; *Frisbie v. Price*, 27 Cal. 253; *Simpson v. Applegate*, 75 Cal. 345.)

The principle upon which a tenant is permitted to remove from the land demised to him trade fixtures that he has placed thereon is that, as he has hired the land in order that he may occupy it for use, and has paid for such use and occupation, it is but equitable that he should be permitted to remove the structures that he may have placed thereon for the very purpose of enabling him to enjoy the use for which he hired the land. (*Wall v. Hinds*, 4 Gray, 270; 64 Am. Dec. 64.) This principle, however, has no application to the occupancy of the land by a vendee who takes possession by virtue of the terms of an executory contract for its purchase. His entry is by reason of the estate in the land which he claims in himself and the improvements which he makes thereon are made in contemplation of his becoming the owner, and if permanently affixed to the land become a part of the realty as fully as if he were the absolute owner. They, therefore, belong to the vendor in case he subsequently declines to comply with his contract of purchase, and he has no right to remove them from the land. (*King v. Johnson*, 7 Gray, 239; *Westgate v. Wixon*, 128 Mass. 304; *Lapham v. Norton*, 71 Me. 83.)

The court did not err in imposing the payment of seventy-five dollars as a condition for postponing the trial of the action, or from proceeding with the trial upon the refusal of the defendants to comply with this condition. The cause had been set down for trial upon that day with the consent of the defendants, and witnesses had been subpoenaed on behalf of the plaintiffs and were in attendance in court at that time, and one of the plaintiffs had himself gone from Los Angeles to Calaveras county to attend the trial. The record does not contain a copy of the bill of costs incurred by the plaintiffs, and we cannot say that the amount required to be paid was excessive. The court was not limited to requiring a payment of the taxable costs as the condition of postponing the trial, but was at liberty to exercise a reasonable discretion for the purpose of compensating the plaintiff for the expenses incurred in preparing for the trial.

The judgment and order are affirmed.

Van Fleet, J., concurred.

BEATTY, C. J., concurring.—I concur in the judgment. There is an express finding of the court that the parties did not occupy the relation of landlord and tenant at the time the mill, etc., were erected on the land. This finding is not attacked by any specification in the statement on motion for new trial, and there is no admission in the pleadings, or other finding of the court, which invalidates it. It must therefore be accepted as a fact established, and is conclusive of the case. If we were permitted to look to the evidence, and especially to some of the terms of the written agreement under which the defendant entered, I should be inclined to hold that he was a tenant within the meaning of section 1019 of the Civil Code.

[S. F. No. 179. In Bank.—October 16, 1897.]

ALFRED H. WILCOX, Appellant, v. JUAN M. LUCO, Respondent.

CONSULS—SUITS AGAINST—INTERNATIONAL LAW.—The immunity of ambassadors and public ministers from suits in the courts of the country to which they are sent is not extended by any principle of international law to consuls. Their liability to suit within the United States is dependent upon the constitution of the United States and the legislation of Congress thereunder.

ID.—JUDICIAL POWER OF UNITED STATES—JURISDICTION—CONCURRENT STATE JURISDICTION.—The judicial power vested in the courts of the United States, by section 2 of article III of the federal constitution, is to be exercised in accordance with such legislation as Congress may prescribe. Wherever the constitution does not make this jurisdiction exclusive of state authority, it may be made so by Congress, and Congress may also declare the extent to which the state courts may exercise concurrent jurisdiction, as well as at what stage of procedure the jurisdiction of the United States courts may attach in cases originally commenced in the state courts.

ID.—ORIGINAL JURISDICTION OF SUPREME COURT.—The provision of section 2 of article III of the federal constitution, giving to the supreme court of the United States "original" jurisdiction in all cases affecting consuls, does not make that jurisdiction exclusive, nor does the provision extending the judicial power of the United States to "all cases" arising under the constitution and laws of the United States make the jurisdiction of the federal courts necessarily exclusive.

ID.—CONCURRENT JURISDICTION OF STATE COURTS.—Under subdivision 8 of section 711 of the United States Revised Statutes, as originally enacted, the United States courts had exclusive jurisdiction of all suits or proceedings against consuls. But by the act of February 8, 1875,

such section was amended by striking out subdivision 8, and since that amendment the state courts have concurrent jurisdiction of such actions or proceedings.

ID.—RIGHT OF FEDERAL INTERFERENCE—WRIT OF ERROR.—A consul cannot be deprived of the benefit of the provision of the constitution extending the judicial power of the United States to all cases in which he is affected, and unless there is some law by which he may invoke this judicial power for the purpose either of removing the cause into the courts of the United States before judgment, or to review the judgment of the state court, a state court can have no jurisdiction to entertain an action in which he is a defendant. Such law is found in section 709 of the Revised Statutes of the United States, providing for a writ of error to the supreme court of the United States from final judgments of the state courts in suits where is drawn in question the validity of a statute or of an authority exercised under any state, on the ground of their being repugnant to the constitution . . . of the United States. Under this section a consul sued in a state court, in addition to any defense he may have to the action, may claim his right under the constitution to have the matter determined by the courts of the United States; and if judgment is rendered against him in the state court, can have it reviewed by the supreme court of the United States, and the sufficiency of his defense determined by that tribunal.

ID.—WAIVER OF RIGHT—JUDGMENT BY DEFAULT.—Such right, however, may be waived by a consul sued in a state court, either by merely pleading his defense to the cause of action without invoking this provision of the constitution, or by suffering default; and, if so waived, he cannot, after judgment has been rendered against him, claim the right to a review of this judgment under a writ of error by the supreme court of the United States.

APPEAL from an order of the Superior Court of the City and County of San Francisco vacating a judgment. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Orestes J. Orena, and William Rix, for Appellant.

I. N. Thorne, for Respondent.

HARRISON, J.—The defendant made his promissory note to the plaintiff for the sum of two thousand dollars, and in an action brought against him thereon in the superior court for San Francisco suffered default, and judgment was rendered against him and in favor of the plaintiff for the full amount of the note. Thereafter upon his motion, based upon his affidavit that at and prior to the commencement of the action and ever since he had been consul general of the republic of Chili, residing in San

Francisco and engaged in performing the functions of his office, the court vacated and set aside this judgment and ordered the action dismissed upon the ground that by reason of his position as consul he was not subject to the jurisdiction of the courts of this state. From this order the plaintiff has appealed.

The correctness of the order appealed from is to be determined upon the construction to be given to the constitution of the United States and the legislation of Congress thereunder, and not upon any consideration of the rules of international law. The immunity of ambassadors and public ministers from suits in the courts of the country to which they are sent is not extended by any principles of international law to consuls. "Consuls are not public ministers. Whatever protection they may be entitled to in the discharge of their official duties, and whatever special privileges may be conferred upon them by the local laws and usages or by international compact, they are not entitled by the general law of nations to the peculiar immunities of ambassadors. In civil and criminal cases they are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the state." (Wheaton's International Law, sec. 249; 1 Kent's Commentaries, 44; Story on the Constitution, sec. 1660; *Giddings v. Crawford*, Taney, 1.)

Section 2 of article III of the constitution of the United States declares that: "The judicial power shall extend . . . to all cases affecting ambassadors, other public ministers and consuls"; and, "In all cases affecting ambassadors, other public ministers and consuls, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." It is held that the judicial power thus vested in the courts of the United States is to be exercised in accordance with such legislation as Congress may prescribe. Wherever the constitution does not make this jurisdiction exclusive of state authority, it may be made so by Congress, and Congress may also declare the extent to which the state courts may exercise concurrent jurisdiction, as well as at what stage of procedure the jurisdiction of the United States courts may attach in cases originally commenced in the state courts—either after

final judgment has been rendered therein, or at any period subsequent to the commencement of the action. (*Martin v. Hunter*, 1 Wheat. 304; *The Moses Taylor*, 4 Wall. 411; *Clafin v. Houseman*, 93 U. S. 130.) By the judiciary act of 1789, and afterward in the Revised Statutes, Congress distributed the exercise of this power between the courts of the United States and those of the several states, making it exclusive in the former in many instances, and in others giving to the state courts concurrent jurisdiction; and also provided for the removal to the United States courts in certain cases of causes commenced in the state courts, and for the exercise by the supreme court of an appellate jurisdiction over judgments of the state courts in causes of which those courts had original jurisdiction concurrent with the courts of the United States. Other statutes have since been enacted enlarging or changing this exclusive as well as concurrent jurisdiction.

Section 687 of the Revised Statutes of the United States, which became the law on the subject from and after December 1, 1873, declares that the supreme court shall have "original, but not exclusive jurisdiction of all suits in which a consul or vice-consul is a party." And by section 563 jurisdiction is given to the district courts: . . . 17. Of all suits against consuls or vice-consuls," with the exception of certain offenses previously named. It had been held in *Giddings v. Crawford*, *supra*, that the provision in the constitution giving to the supreme court "original" jurisdiction in all cases affecting consuls did not imply that that jurisdiction was to be exclusive, and in *Bors v. Preston*, 111 U. S. 252, the supreme court approved this ruling and held that Congress could confer upon the subordinate courts of the United States concurrent original jurisdiction in cases affecting consuls. It was also held in *Clafin v. Houseman*, *supra*, that the provision extending the judicial power of the United States to "all cases" arising under the constitution and laws of the United States does not imply that the jurisdiction of the federal courts is necessarily exclusive.

Section 711 of the Revised Statutes, as originally enacted, declared: "The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states. . . . 8. Of all suits or proceedings against ambassadors or other public minis-

ters, or against consuls or vice-consuls." By the act of February 8, 1875 (18 Stats., p. 316), entitled "An act to correct errors and to supply omissions in the Revised Statutes of the United States," section 711 was amended by striking out the above subdivision 8, and since that date there has been no express declaration in the statutes of the United States that the jurisdiction of its courts in actions against a consul is exclusive of the state courts. It is very evident that prior to this amendment the state courts had no jurisdiction in such cases. (*Davis v. Packard*, 7 Pet. 276; *Valarino v. Thompson*, 7 N. Y. 576.) We have not been cited to any case since that date in which the question appears to have been considered. The decision in *Miller v. Van Loben Sels*, 66 Cal. 341, was made upon a consideration of the judiciary act of 1789, and, although in the petition for rehearing the amendment to section 711 was called to the attention of the court, the failure of the court to reconsider its opinion does not authorize us to say that it held that the exclusive jurisdiction of the federal courts had not been changed. (*Kellogg v. Cochran*, 87 Cal. 192; *San Francisco v. Pacific Bank*, 89 Cal. 23.) We do not consider that the case of *De Givs v. Grand Rapids etc. Co.*, 94 Ga. 605, is entitled to any weight in determining the question before us, for the reason that the court in that case merely affirmed an order refusing to set aside a judgment against a consul without giving any opinion in support of its judgment. *Claffin v. Houseman*, *supra*, cited by the appellant, was an action brought in a state court, prior to the enactment of the Revised Statutes, by an assignee in bankruptcy to recover the assets of the bankrupt's estate, and the jurisdiction of the state court was contested under the provision of the constitution that the judicial power of the United States shall extend to "all cases" arising under the constitution and laws of the United States. The supreme court, however, upheld the jurisdiction of the state court, upon the ground that the laws of the United States are operative within the states, and that wherever rights of property are created by virtue of these laws such rights may be enforced in state courts competent to decide rights of like character and class. This was a case, moreover, in which the assignee himself invoked the jurisdiction of the state court, and the court limits its decision to holding that he had authority to bring a suit in the state courts whenever these courts were in-

vested with appropriate jurisdiction suited to the nature of the case. The proposition thus determined is not, however, conclusive of the present appeal, since there is not here presented for determination any question of property rights or of personal liberty depending upon or arising under the constitution or any law of the United States. The defendant claims an exemption from the jurisdiction of the state courts as a right guaranteed to him by the constitution.

By the above amendment to section 711, removing from the statutes the express provision that the jurisdiction of the federal courts in suits or proceedings against consuls should be exclusive of the courts of the several states, Congress must have intended to declare that such jurisdiction should no longer be exclusive, unless it was made exclusive either by the constitution itself or by other existing legislation. There is, however, as above seen, no express declaration by Congress that such jurisdiction is exclusive, but it must be conceded that a consul who has been recognized by the President and admitted to the exercise of his official functions shall not, so long as he continues in the exercise of those functions, be deprived of the benefits of the provision in the constitution extending the judicial power of the United States to all cases in which he is affected, and that, unless there is some law by which he may invoke this judicial power for the purpose either of removing the cause into the courts of the United States before judgment, or to review the judgment of the state court, a state court can have no jurisdiction to entertain an action in which he is a defendant. Under this provision of the constitution he is entitled to invoke the exercise of that power in any case to which he may be a party, and, if Congress has made any provision by which he can avail himself of this right, he is amply protected in the enjoyment of this provision of the constitution. The constitution does not declare that he shall be exempt from the jurisdiction of the state courts, but that the judicial power of the United States shall extend to all cases affecting him. It is for Congress to determine the mode and time at which he may invoke this jurisdiction, and, if that body has provided a means by which he can avail himself of this judicial power, he is not deprived of any right given him by the constitution. There is no provision in the removal act of 1875, or in that of 1887, for removing to

the circuit court an action commenced in a state court against a consul, but it is provided in section 709 of the Revised Statutes that "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity, . . . may be re-examined and reversed or affirmed in the supreme court upon a writ of error." Under this section that court has jurisdiction to review the judgment of a state court whenever it appears from the record that one of the questions mentioned in the section was raised and presented to the state court, and decided by it adversely to the claim asserted; and, if such decision is erroneous, that court will then examine the entire case, and affirm or reverse the judgment according as it shall determine whether the decision of the state court upon the other matters in the record was correct or not. (*Murdock v. Memphis*, 20 Wall. 590.)

It is thus seen that if a consul is sued in a state court he can, in addition to any defense he may have to the cause of action set up against him, claim his right under the constitution to have the matter determined by the courts of the United States; and if judgment is rendered against him in the state court he can have that judgment reviewed by the supreme court of the United States and the sufficiency of his defense determined by that tribunal, and thus fully enjoy the rights given him by the constitution. This right, however, may be waived by him, since he has the same right to rest content with the judgment of the state court, either by merely pleading his defense to the cause of action without invoking this provision of the constitution, or by suffering default, as he would have to invoke its jurisdiction as a plaintiff; and, if so waived, he cannot, after judgment has been rendered against him, claim the right to a review of this judgment under a writ of error by the supreme court of the United States.

The superior court, therefore, had jurisdiction to entertain the action against the defendant, and as he did not appear in answer to the complaint, or in any mode present a defense to the action, the court properly rendered judgment against him, and

its subsequent order setting it aside and dismissing the action was erroneous.

The order is reversed.

Van Fleet, J., Garoutte, J., Henshaw, J., and Beatty, C. J., concurred.

McFARLAND, J., dissenting.—I dissent. My views of the case were expressed in my opinion delivered when the case was in Department.

The following is the opinion of Department Two, rendered on July 16, 1896, referred to and adopted by Mr. Justice McFarland:

McFARLAND, J.—The only question presented in this case is, whether the superior court had jurisdiction in a civil case over the person of the defendant, who is the consul general of Chili for the United States, resident at San Francisco, California. The court below held that it had no jurisdiction, and the plaintiff appeals from the judgment.

The question was determined adversely to the contention of appellant by this court in the case of *Miller v. Van Loben Sels*, 66 Cal. 341. Appellant contends that said case should not be considered as conclusive authority upon the question, because at the time it was decided the ninth section of the judiciary act of 1789 expressly provided that the jurisdiction of the United States over consuls was exclusive; and that since then, on February 18, 1875, the Congress of the United States, by an act entitled "An act to correct errors, etc., in the Revised Statutes," repealed the said section of the said act of 1789; and that the court in said case of *Miller v. Van Loben Sels*, *supra*, assumed that said section 9 was still in existence, and that its attention was not called to the said repeal of said section. The attention of the court in that case was called to such repeal by a petition for rehearing; but it is contended by appellant that the court must be deemed to have not considered a point presented for the first time in such petition. Whether that decision should or should not be considered as final authority upon the question, we are satisfied that the rule there declared was correct, even in view of the fact that said section of

the act of 1789 has been repealed. By section 2 of article III of the constitution of the United States it is provided that the judicial power of the United States shall extend "to all cases affecting ambassadors, other public ministers and consuls." By this provision consuls are put on the same footing with ambassadors. Under our system, the government of the United States is the only sovereign having relations with foreign countries under the law of nations; and all dealings with the representatives of foreign nations must be by the courts or other agencies of the government which is alone sovereign in that regard. It is the right and privilege of the foreign government to be thus treated. In *Davis v. Packard*, 7 Pet. 276, it was contended that Davis, who was consul general of the King of Saxony, had waived his privilege by not setting it up at the proper time in the court below. The supreme court of the United States, however, did not sustain this contention, and said: "If this was to be viewed merely as a personal privilege, there might be grounds for such conclusion, but it cannot be so considered. It is the privilege of the country or government which the consul represents. This is the light in which foreign ministers are considered by the law of nations, and our constitution and law seem to put consuls on the same footing in this respect. If the privilege or exemption was merely personal, it can hardly be supposed that it would have been thought a matter sufficiently important to require a special provision in the constitution and laws of the United States. Higher considerations of public policy doubtless led to the provision. It was deemed fit and proper that the courts of the government with which rested the regulation of all foreign intercourse should have cognizance of suits against the representatives of such foreign governments." We think, therefore, that under the said provision of the constitution of the United States there was no jurisdiction of the case at bar in the superior court of this state.

[Sac. No. 87. In Bank.—October 22, 1897.]

COLFAX MOUNTAIN FRUIT COMPANY, Respondent, v.
SOUTHERN PACIFIC COMPANY, Appellant.

RAILROAD COMPANIES—CARRIAGE OF FRUIT—POWER TO CONTRACT—CONTINUOUS PASSENGER TRAIN SERVICE BEYOND TERMINUS.—A railroad company has power to contract to carry fruit by continued passenger train service over its own and connecting lines to a place of destination beyond the terminus of its own route.

ID.—SHIPPING ORDER—CONSTRUCTION OF CONTRACT—AGREEMENT TO FORWARD FRUIT TO DESTINATION NAMED—THROUGH FREIGHTS—LIMITATION OF CARRIER'S LIABILITY—INJURY FROM DELAY UPON CONNECTING LINE—ACTION FOR BREACH OF CONTRACT.—A contract in the form of a shipping order, made between the shippers and the Southern Pacific Company, upon one of its printed blanks used for regular freight service, to forward fresh fruit loaded in a Union Pacific car to Ogden Station, addressed to a firm in New York, with an agreement for through freight to that city, and concluding with the words: "Care C. & N. W. via Erie Dispatch, New York. Passenger train service. U. P. 32,009. Agent Southern Pacific Company will please forward, subject to conditions and agreements indorsed hereon," and bearing the following printed indorsement: "That the company agrees to forward the property to the place of destination named; but its responsibility as a common carrier is to cease at the station where the freight leaves this road, where the property is to be delivered to connecting roads or carriers," is to be construed as a special contract for continuous passenger train service of the loaded fruit-car to New York, and the limitation of the carrier's liability beyond its own line does not affect an action not brought upon such liability, but brought against it by the shippers to recover damages for breach of the special contract, on account of delay in transmission of the car upon one of the connecting lines, causing injury to the fruit.

ID.—AGREEMENT TO "FORWARD" FRUIT—MEANING OF CONTRACT.—The word "forward," used in the agreement to forward the fruit, is to be understood in the same sense throughout the contract; and inasmuch as the agreement that the fruit was to be "forwarded to Ogden" necessarily imported an agreement to carry or transport it to that place, so also the agreement "to forward the property to the place of destination" is to be understood as using the word "forward" in the same sense, and not in its technical or commercial sense, as putting the carrier in the position of a forwarder; and taking the agreement to forward the fruit, in connection with the agreement for passenger train service, and with the address, specified route, and place of destination of the fruit, the language employed in the contract imports an agreement to transport and carry the fruit through to New York by passenger train service.

ID.—REQUEST FOR PASSENGER SERVICE OVER CONNECTING LINE—IMPLIED CONTRACT—INSTRUCTIONS—EXPRESS CONTRACT.—The contract does not import

that the Southern Pacific Company should merely request passenger service over the Union Pacific and other connecting lines, and the law demanded no such request; but its implied contract demanded that it should deliver the fruit to the Union Pacific Company with instructions to further transport it, and there was no implied, but an express, contract that the fruit should have passenger train service thereafter.

Id.—PLEADING—VARIANCE—STIPULATED TERMS OF CONTRACT—WAIVER OF OBJECTION—REVIEW UPON APPEAL.—Where no objection was made in the trial court in any stage of the proceeding to a variance between the complaint and the stipulated terms of the contract agreed upon by the parties at the trial, a judgment for the plaintiff will not be reversed upon appeal on account of such variance.

APPEAL from a judgment of the Superior Court of Placer County. J. E. Prewitt, Judge.

The facts are stated in the opinion of the court.

Foshay Walker, for Appellant.

Ben. P. Tabor, and Charles Tuttle, for Respondent.

GAROUTTE, J.—This is an action to recover damages. The case was tried upon an agreed statement of facts, and judgment went for plaintiff. This appeal is prosecuted from such judgment.

The important question presented here for consideration is: Does the judgment follow the findings of fact? And the determination of that question is dependent upon the construction to be given a certain contract entered into between the parties to the action. This contract was in the form of a shipping order, made out by plaintiff, and the parts thereof material for our consideration are as follows:

“Shipping Order, Southern Pacific Company.

“Colfax Station, October 24, 1890.

“Delivered this day by the undersigned to the Southern Pacific Company the property herein described, in apparent good order, except as noted, to be forwarded with as reasonable dispatch as its general business will permit, to Ogden *Station, and there delivered in like good order, . . . on payment of charges, subject to the following conditions and agreements indorsed hereon:

“Consignee, Marks, and Destination, Sgobel & Day, New York.”

(Here follows a description of the property, consisting of fresh fruit.) "Care C. & N. W., via Erie Dispatch, New York. Passenger train service, U. P. 32,009. Agent Southern Pacific Company will please forward, subject to conditions and agreements indorsed hereon.

"(Signed)

C. M. F. CO., Shippers.

"(*) When freight is destined off or beyond the line of Southern Pacific Company agents will be careful to note that the name here inserted is the station at which freight leaves the road."

This printed contract, at the time of being signed and delivered by plaintiff to defendant, had indorsed upon the back thereof, among other printed conditions, the following: "That the company agrees to forward the property to the place of destination named; but its responsibility as a common carrier is to cease at the station where the freight leaves this road, when the property is to be delivered to connecting roads or carriers." It seems that the characters "U. P. 32,009" meant Union Pacific Car No. 32,009.

Defendant transported the car in question by passenger train over its road to Ogden, and there delivered it to the Union Pacific Railway Company, the next connecting carrier, with a request that the last-named company "and its connection between Ogden and New York city should, until the arrival of said car at final destination, accord to it passenger train service." After delivery to the Union Pacific Company—but on what line does not appear—delay occurred in the transmission of the car, so that it was three days overdue on arrival at New York, and, in consequence, the fruit suffered decay, and was sold at a loss to plaintiff. This loss forms the basis of the judgment rendered.

It is contended by plaintiff that by the contract, which has been substantially set forth, defendant undertook to furnish passenger train service for the car of fruit from Colfax to New York, and that the connecting lines were its agents for this purpose. It is claimed by defendant that under the contract, upon delivery of the car of fruit at Ogden to the Union Pacific Company with instructions for continued passenger train service, defendant's obligation under the contract terminated. There is no question but that the defendant had the power to enter into a contract with plaintiff, whereby it bound itself to carry this fruit from Colfax

to New York city by passenger train service. Such is the law everywhere, and this principle is directly recognized by section 2201 of the Civil Code, which in effect provides that the liability of a common carrier who accepts freight for a place beyond his usual route ceases upon delivery of the freight at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, unless he stipulates otherwise.

There is nothing in the contract justifying the construction that its terms demanded "passenger service to Ogden, and a request simply to connecting carriers for passenger service thereafter." A shipper desirous of through passenger train service would hardly be satisfied with such a contract. By that construction there would be no obligation upon the part of the Union Pacific Company to give passenger service, and its refusal to furnish it would create no liability either against it or defendant. The defendant's implied contract demanded that it deliver the fruit to the Union Pacific, with instructions to further transport it, but there would be no implied contract that this fruit should have passenger train service thereafter. The law demanded no such request from defendant. The contract upon its face contains no covenant that a request for passenger train service should be made by defendant of the Union Pacific Company. As to such service, the contract before us bears but one of two constructions: either it was an agreement upon the part of the defendant to furnish such service to Ogden, or an agreement to furnish such service to New York city.

The contract is a printed form, and is evidently used for regular freight service. It is also apparent that it is used for all freight service, whether or not the freight be transported beyond its own lines of road. For these reasons apparent inconsistencies arise as to some of its provisions.

If the defendant agreed to transport this fruit to New York, there can be no question but that it also agreed to give it passenger train service; for that the fruit was to have such service as far as the defendant agreed to carry it is and must be conceded. The contract is unilateral in form, and in three distinct and separate places therein we find an agreement as to the transportation of this freight: 1. Defendant agreed to forward it to Ogden sta-

tion from Colfax, "with as reasonable dispatch as its general business would permit"; 2. Defendant agreed to forward it "subject to conditions and agreement indorsed hereon"; 3. The defendant agreed to "forward the property to the place of destination named." The first provision is an agreement to carry the fruit from Colfax to Ogden; the second provision is clearly one to carry the fruit from Colfax to one of two places—Ogden or New York; the third provision is one to carry the fruit from Colfax to Ogden, or from Colfax to New York; or it is an agreement to forward the fruit from Ogden to New York.

It will be observed that the verb "carry," or "transport," is not used in this contract, but that the verb "forward" is used in the three provisions cited. It cannot be questioned that the defendant in agreeing to forward the fruit, as the word is used in the first two instances found in the contract, stood in the position of a common carrier toward the plaintiff, and not in the position of a "forwarder." It must be true that it was treating with plaintiff in that capacity; and it is equally true that by the use of the verb "forward" it was understood by both parties that the defendant was to carry or transport the fruit. This is manifest when it is considered that the route from Colfax to Ogden is its own, and that the property was to be taken over that route by it. Hence, as a common carrier, it agreed to "forward" the fruit over its own road; in other words, carry or transport it. This brings us to a consideration of the meaning of the word "forward" as used in the last provision cited. When contracting parties use the same word three times in a contract, and in the first two instances its meaning is plain, other things being equal, it should be given the same meaning when used the third time. Any doubt or ambiguity as to the intention of the parties in the use of the word under such circumstances should be solved in favor of the construction conceded in other portions of the contract. Especially should such construction obtain when the word is a verb, and in each instance purports to deal with the same property. It follows that if the verb "forward," as used in the contract, means to carry or transport in two instances, it not being apparent that any other meaning was intended when used a third time, we will give it the same meaning when so used. Upon such construction the last clause of the contract we have quoted binds the defendant to carry

or transport the fruit to "the place of destination named," and that place was New York. It certainly cannot be contended that it was Ogden station, for it was shipped to New York. By the contract it was consigned to Sgohei & Day, New York. The contract, in terms, declares its "destination" to be New York; freight was agreed to be paid upon it to that city, and the particular common carriers that were to transport it to that point are set forth upon the face of the contract.

The provision of the contract which we have just been considering, quoted in full, is as follows: "That the company agrees to forward the property to the place of destination named, but its responsibility as a common carrier is to cease at the station where the freight leaves this road, when the property is to be delivered to connecting roads or carriers." Taking this provision alone, its natural and reasonable construction is an agreement to carry and transport this car of fruit from Colfax to New York. It is plain that the word "forward" is not used in its technical, commercial sense, and that by its use the defendant did not intend to assume the duties of a "forwarder." In the first place, the defendant, as a common carrier receiving property consigned to New York, was bound by implied contract to forward that property from Ogden; hence the provision from such standpoint has no force. Second, if the agreement was simply to "forward" from Ogden to New York, all the latter portion of the provision has no force and effect; for, if the defendant was acting simply as a "forwarder" of freight, he would assume no liability as a common carrier after the fruit left Ogden. Section 2101 of the Civil Code so provides in terms. Third, this clause of the provision clearly applies to all freight handled by defendant, whether that freight be consigned to a point upon or beyond its route; hence the word "forward" must necessarily be deemed to be used in the sense of transport or carry. If the provision be construed as alone referring to the forwarding of freight by defendant over another route, it would be inharmonious and inconsistent with the clause which follows, wherein it is provided that when the property is to be delivered to connecting roads or carriers defendant's liability as a common carrier ceases. By this clause of the provision it is clearly implied that property is "forwarded" to the place of destination when not delivered to connecting roads or

carriers. For these reasons also we conclude that this provision of the contract contains an agreement to transport and carry this freight from Colfax to New York. The clause following, to the effect that it shall be relieved from liability as a common carrier while the goods are in transit between Ogden and New York, in no way affects the question under consideration, for the liability here sued upon is not the liability of a common carrier, but a liability incurred for a breach of a special contract. By this conclusion the three provisions of this contract we have had under consideration are consistent and harmonious, and due force and effect are given to each. The defendant's contract being to carry this freight to New York, it necessarily follows that it was to give it passenger train service to that point. It failed to render such service, hence there was a breach, and a loss resulted to plaintiff by reason of that breach.

The contract between the parties, as stipulated at the trial, varied from that alleged in the complaint, but it seems no objection was made by the defendant on this ground in the court below at any stage of the proceeding, and for this reason we will not now reverse the judgment upon the ground of such variance. We find no substantial error in the record.

For the foregoing reasons the judgment is affirmed.

Van Fleet, J., Harrison, J., Temple, J., and Henshaw, J., concurred.

McFarland, J., dissented.

[S. F. No. 750. Department Two.—October 26, 1897.]

FELIX TRACY, Appellant, v. WILLIAM ALVORD et al.,
Executors, etc., of J. C. Wilmerding, Deceased, Respondents.

GIFT—PROMISSORY NOTE OF DONOR.—The gift of the donor's own promissory note, either *inter vivos* or in view of death, does not create an enforceable obligation in favor of the donee against the donor or his estate.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. John Hunt, Judge.

The facts are stated in the opinion.

Charles A. Garter, for Appellant.

Edward J. McCutchen, and Page, McCutchen & Eells, for Respondents.

BRITT, C.—Defendants' testator, J. C. Wilmerding, died February 20, 1894. About one year previously he made and signed a paper writing having the form of a promissory note for ten thousand dollars, payable sixty days from its date to the order of Felix Tracy, the plaintiff. It is claimed on the latter's behalf in this action (which is founded on said note as a demand against the estate of said deceased) that the instrument was delivered by the testator to a third person for plaintiff's use, and that a valid gift thereof, either *inter vivos* or in view of death, was made by the testator to the plaintiff. There was no consideration for the note, and plaintiff first learned of its existence by information from the executors some months after the testator's death.

The court below found that there was no delivery of the note as alleged by plaintiff, and held therefore that the instrument never had effect; whether the evidence justified such finding is made a question in the case, but it is not necessary to be decided. For if it were conceded that delivery was proved, yet, as between the donee and the donor or his estate, the gift of the donor's own promissory note created no enforceable obligation; being a mere promise without consideration to give a sum of money in the future, it was of no legal consequence. The gift of such a note *causa mortis* is within the rule; besides tending to subvert the statute of wills, it is still but a promise to make a gift, and invalid because the thing promised is not delivered. Authorities are numerous; the following are among the more recent: *Bartlett's Petition*, 163 Mass. 509; *Sanborn v. Sanborn*, 65 N. H. 172; *Matter of James*, 146 N. Y. 78; 58 Am. St. Rep. 771; *Shaw v. Camp*, 160 Ill. 425; *Johnson v. Otterbein University*, 41 Ohio St. 527; 1 Daniel on Negotiable Instruments, sec. 25. Some cases in Pennsylvania supposed by appellant to create a ripple in the current of authority rested on the efficacy of the seal attached to the instrument to import a consideration; this distinction is pointed out in *Kern's Estate*, 171 Pa. St. 55. Appellant

suggests, rather than urges, that in view of our statute abolishing the distinction between sealed and unsealed instruments (Civ. Code, sec. 1629) the present case should fall within the doctrine applied to sealed notes in the cases cited by him. But we apprehend that counsel does not desire to be understood as arguing that a written instrument in this state carries with it the conclusive implications of the seal at common law. The statute referred to was designed to operate in the contrary direction, viz., to make sealed as well as unsealed instruments open to defense for want of consideration. The judgment and order appealed from should be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 909. Department Two.—October 26, 1897.]

In the Matter of the Estate of JOSHUA HENDY, Deceased.

TRUST—WILL—DURATION OF TRUST—LIFE IN BEING.—A provision in a codicil of a will that a previous unconditional bequest of five thousand dollars to the testator's niece, who was living at the time of his death, "is to be held in trust by my executors for her benefit and the interest is to be paid her monthly, at her death the same to be continued to her two children . . . until they are each twenty-five years of age, when the five thousand dollars shall be paid to them share and share alike," establishes two independent trusts, the first for the benefit of the niece, and the other for the benefit of her children. The first trust, being dependent upon a life in being, is valid, irrespective of any invalidity in the latter, and it was error for the court to decree a distribution of the fund absolutely to the niece.

ID.—POWER OF ALIENATION.—A trust is not invalid for undue suspension of the power of alienation, if, by its express terms or by necessary construction, its ultimate duration is always dependent upon lives in being. No absolute or certain term, however short, is valid.

ID.—CONSTRUCTION OF TRUST.—The trust for the benefit of the children who were in being at the death of the testator, is not invalid for undue suspension of the power of alienation, because in no possible event is the power of alienation suspended beyond the existence of lives in being. If the niece outlives her children, then the trust must cease upon her death; if she dies before her children, and they in turn both die before reaching the age of twenty-five years, the trust

would terminate for lack of beneficiaries; when both, or either of them surviving, reach the age of twenty-five, the mother being dead, the trust also ceases.

APPEAL from a decree of partial distribution of the Superior Court of the City and County of San Francisco. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Nowlin & Fassett, William H. H. Hart, C. P. Robinson, N. D. Anderson, and E. B. Young, for Appellants.

J. P. Langhorne, and W. T. Baggett, for Respondent.

HENSHAW, J.—Joshua Hendy by his will left a legacy of five thousand dollars to his niece, Mrs. Josephine Green. By a codicil, which was admitted to probate with and as a part of that instrument, he provided as follows:

“The bequest of five thousand dollars to my niece Mrs. Josephine Green is to be held in trust by my executors for her benefit and the interest is to be paid her monthly, at her death the same to be continued to her two children Harrold and Mildred Green until they are each twenty-five years of age, when the five thousand dollars shall be paid to them share and share alike.”

Josephine Green petitioned for distribution to her absolutely of the legacy of five thousand dollars, and the court decreed distribution in accordance with her prayer, under the conviction, as appears from the statement and argument of her counsel, that the trust declared in the codicil was void for undue suspension of the power of alienation. (Civ. Code, sec. 715.)

This consideration is the only one to which^{*} our attention is directed upon this appeal.

It is apparent that the codicil does not create a single trust, but establishes: 1. A trust for the benefit of Mrs. Josephine Green; and 2. A trust for the benefit of her two children, Harrold and Mildred. Harrold and Mildred were in being at the creation of the trust, and are still living and in their minorities. Therefore, whatever conclusion may be reached as to the validity of the trust for the children, it is obvious that there can be no legal objection advanced against the trust to Mrs. Green. The

testator had the unquestioned right to revoke his absolute legacy of five thousand dollars, or to substitute for it a provision under which she would receive the income of that sum set apart in trust during her life.

It is manifest, therefore, that the decree awarding Mrs. Green five thousand dollars as an absolute legacy must be reversed; since the trust as to her being valid and distinct from that on behalf of the children, the utmost she would be entitled to receive in any event would be the income from the fund during her life. The future disposition of the principal of the fund would concern only the children and the residuary legatees.

As to the trust for the children, we need here go in its construction only so far as to see whether or not it violates the rule against perpetuities. That rule, enunciated in section 715 of the Civil Code, permits property to be held inalienable, provided that the power of alienation be not suspended beyond the existence of lives in being. Therefore the duration of designated lives must always be, and be made, the ultimate measure of duration. But it matters not what other measures be taken, so long as they cannot extend the period of suspension beyond, and are controlled by the duration of, designated lives. Thus it was said in the *Estate of Walkerly*, 108 Cal. 627, 651, 49 Am. St. Rep. 97: "The law has seen fit to insist that the measure of the period of suspension shall be lives in being, and it will not countenance the suspension for any fixed period or term of years not depending upon the duration of life." In the *Walkerly* case the court was dealing with an attempted suspension for an absolute, definite, and fixed period of twenty-five years. It was there held, as uniformly it has been held under laws similar to our own, that the utmost limit of the period of the suspension of the power of alienation by any trust or future estate must not by any possibility exceed existing lives, or the trust or estate will be void in its creation. No absolute or certain term, however short, can be supported.

Thus a trust to continue for twenty-five years, provided A, B, and C (designated lives), or any of them, shall so long survive, but in the event of the death of the last one before the expiration of that period of time, then the trust to cease and determine, does not violate the law against perpetuities; for it is apparent

that the duration of lives in being controls the term of the trust, and that the period of twenty-five years is within and dependent upon the duration of these lives. (*Schermerhorn v. Cotting*, 131 N. Y. 48.) Upon the other hand, a trust until the "youngest child now living shall arrive at the age of twenty-one years, or would arrive at that age if living," fixes an absolute period not dependent upon existing lives for the duration of the trust, is repugnant to the statute against the suspension of the power of alienation, and is consequently absolutely void. (*Haynes v. Sherman*, 117 N. Y. 433.)

But it matters not whether it be by express terms or by necessary construction that lives in being measure the duration of the trust. If it appear with certainty that the trust cannot longer continue, the law against perpetuities is not violated. Thus a trust in property to pay the income to A until he arrives at the age of forty years would not violate the law, for every trust of necessity ceases when there is no beneficiary, and in the case instanced it is obvious that A's life is the ultimate and determinative measure of duration. In no event can the trust continue longer than his life; upon his death before reaching the age of forty years the trust determines for lack of a beneficiary.

Examining the trust to the children with these considerations in mind, it is clear that, while inartificially drawn, it does not unduly suspend the power of alienation. If Mrs. Green outlives her children, then the trust must cease upon her death. If she dies before her children, and they in turn both die before reaching the age of twenty-five years, then also the trust terminates for lack of beneficiaries. When both, or either of them surviving, reach the age of twenty-five, the mother being dead, the trust also ceases. In no possible event, then, is the power of alienation suspended beyond the existence of lives in being, the lives of the beneficiaries under the two trusts.

For the foregoing reasons the decree is reversed.

Temple, J., and McFarland, J., concurred.

[Sac. No. 331. Department One.—October 30, 1897.]

In the Matter of the Estate of WILLIAM JOSEPH, Deceased.

ESTATE OF DECEASED PERSONS—PROCEEDING TO REVOKE PROBATE—NONRESIDENT CONTESTANT—SECURITY FOR COSTS.—A contest to revoke the probate of a will is a special proceeding, and not an action within the meaning of section 1036 of the Code of Civil Procedure, requiring nonresident plaintiffs to give security for costs. In such proceeding, a nonresident contestant is not required to give such security.

APPEAL from a judgment of the Superior Court of Sacramento County dismissing a petition for the revocation of the probate of a will. Matt. F. Johnson, Judge.

The facts are stated in the opinion.

D. E. Alexander, and Isaac Joseph, for Appellant.

Hinkson & Elliott, and A. J. Bruner, for Respondent.

CHIPMAN, C.—Deceased died testate. A document purporting to be his last will was admitted to probate February 17, 1888, and the executors named therein were duly appointed. It does not appear whether or not the estate has been distributed. On December 13, 1894, appellant, one Wesley J. Lovett, filed his petition to revoke the probate of said will and contesting the same. Issues upon the merits were framed and were in condition to be tried, whereupon the executors, by their attorneys, served notice upon appellant that they would move the dismissal of appellant's said petition, on the ground that "due and legal notice was served on said attorneys of said Lovett, on the fifteenth day of June, 1895, to file with the clerk of the above-named court an undertaking, as is provided for in section 1036 of the Code of Civil Procedure; that more than thirty days have elapsed since the service of said notice, and the said undertaking has not been filed." At the hearing of the motion it was admitted by appellant that he had not filed the undertaking referred to. It was also admitted that appellant is a citizen of the state of Ohio. The court granted the motion, and entered an order dismissing the petition of appellant and the contest. The appeal is from this order, and comes up on bill of exceptions.

Appellant claims that section 1036 of the Code of Civil Procedure applies solely to actions and not to special proceedings; that a proceeding to revoke the probate of a will is a special proceeding, and is not an action within the meaning of this section of the code.

Appellant also claims that, if it should be held that sections 1036 and 1037 of the Code of Civil Procedure apply to proceedings to contest the probate or validity of a will, then those sections are in violation of article IV, section 2, and article XIV, section 1, of the constitution of the United States.

Respondents contend that proceedings to contest a will, both when first offered to probate or later after probate, are in their nature civil actions and possess all the elements of an action; that section 1312 of the Code of Civil Procedure declares that: "On the trial the contestant is the plaintiff and the petitioner is the defendant," which is mandatory because the proceeding is in the nature of a civil action; that section 1314 of the Code of Civil Procedure denominates the proceeding as a "case," and a "case" is a suit or action—a cause (citing Burrell's Law Dictionary, 253); and finally respondents claim that the whole question is disposed of by section 363 of the Code of Civil Procedure, which provides that "the word 'action,' as used in this title, is to be construed, whenever necessary so to do, as including a special proceeding of a civil nature."

Is a proceeding to contest the probate or validity of a will under section 1327 of the Code of Civil Procedure, an action within the meaning of section 1036 of the Code of Civil Procedure?

Under our code remedies are divided into two classes: "1. Actions; and 2. Special proceedings." (Code Civ. Proc., sec. 21.)

"An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Code Civ. Proc., sec. 22.) "Every other remedy is a special proceeding." (Code Civ. Proc., sec. 23.) The respondents made their motion to dismiss the contest in this case, and the court gave the order by virtue of section 1036 of the Code of Civil Procedure, which reads: "When the plaintiff in an action resides out of the state, or is a foreign corporation, security for costs and charges, which may be awarded against plaintiff, may be required by the defendant." Section

1327 of the Code of Civil Procedure, under which the contest was begun, provides: "When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will, or against the sufficiency of the proof, and praying that the probate may be revoked."

We think without doubt a petition to probate a will is the beginning of a special proceeding. The hearing and judgment reached upon it in no sense constitute an action as defined by section 22 of the Code of Civil Procedure, nor as referred to in section 1036 of the Code of Civil Procedure, and, if not, it is necessarily a special proceeding. (Code Civ. Proc., sec. 23.) We cannot see how the filing of grounds of opposition to the probate of the will, or, later, the filing of a petition to contest the probate, can change the nature of the proceeding. The order admitting the will to probate is not final so long as proceedings may be taken to revoke the probate. In all subsequent stages the contest is but a part of the proceeding to probate the will, and is not a new and distinct proceeding. The subject matter is the same, and the ultimate issue, to wit, whether the will in question should stand as probated, is the same. It is not "an ordinary proceeding in a court of justice by which one party prosecutes another," etc., as defined in section 22 of the Code of Civil Procedure. The fact that section 1312 says that "on the trial the contestant is plaintiff and the petitioner is defendant" does not tend to show that the nature of the proceeding is changed; it presupposes matter set up as grounds of contest as to which the burden of proof is cast upon the contestant, but it does not purport to be, nor is it, a new action or proceeding. It is entitled "In the Matter of the Estate of" the deceased; it receives all its vitality from, and has its origin in, the original petition to probate the will and the statutory provisions governing the proceedings. Section 363, relied upon by respondents as conclusive, cannot receive the construction given it by them unless it be changed so as to make the word "action" and the words "special proceeding of a civil nature" interchangeable and synonymous wherever used in the codes, and this would be incon-

sistent with our division of judicial remedies as shown in sections 21, 22, and 23 of the Code of Civil Procedure. We must not confound this division of remedies—"Actions" and "special proceedings"—with the definition given of "Action"—which are all either "Civil" or "Criminal," while "special proceedings" are not defined at all.

Nearly all, if not all, special proceedings are civil in their nature, but it was manifestly the intention of the code to keep clear and distinct the division of civil remedies into actions and special proceedings, and so we see later in its arrangement that part II, in which section 1036 occurs, is entitled and treats of "Civil Actions," while part III, in which the probate of wills is provided for, is entitled and treats "of special proceedings of a civil nature." If the provisions of these several titles are to be used interchangeably and made applicable to each other, where there is no express provision authorizing it, we would introduce confusion and often direct contradictions in the methods of practice pointed out in these two divisions of remedies.

It was held in an early case that "proceedings for the settlement of an estate and matters connected therewith are not civil actions within the meaning of the practice act, sections 18 to 21." (*Estate of Scott*, 15 Cal. 220.)

It has been several times held that proceedings to ascertain who are the heirs at law of the deceased and to distribute the estate under section 1664 of the Code of Civil Procedure, "while partaking of the nature of a civil action, is not a civil action." (*Estate of Blythe*, 110 Cal. 226; *Estate of Burton*, 93 Cal. 459; *Smith v. Westerfield*, 88 Cal. 374.)

A careful comparison of section 1664 with the sections relating to contesting the probate of a will, and the reasons given for holding that a petition under section 1664 is a special proceeding, will, we think, make quite clear the reasons for holding as we do that the contest of a will is not an action as contemplated in section 1036, but is a special proceeding to which that section does not apply. This view of the question presented makes it unnecessary to notice the point raised, that section 1036 is unconstitutional.

The judgment and order dismissing appellant's petition should be reversed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order dismissing appellant's petition are reversed.

Garoutte, J., Harrison, J., McFarland, J.

[L. A. No. 228. Department Two.—November 1, 1897.]

LILIE C. SULLIVAN et al., Respondents, v. CHARLES A. LUMSDEN, Respondent, and J. H. D. WINGFIELD et al., Appellants.

PARTITION—GRANT OF PUEBLO LANDS—REFERENCE TO OFFICIAL MAP—SUBSEQUENT CHANGE OF MAP—DIFFERENCE IN LOCATION OF LOT.—Where a city sold and conveyed its title to all of the lands of a pueblo lot by reference to an official map of the pueblo lands of the city then on file in the office of the city clerk, and designated by the name of the surveyor who made it, and the title to lands sought to be partitioned is deraigned from the city under deeds of portions of such pueblo lot, containing such reference, the partition must be made according to such official map, and not according to another official map subsequently adopted by the city, giving a different location of such pueblo lot.

ID.—JURISDICTION OF EQUITY—VACATION OF DECREE—RE-PARTITION—MISTAKE OF REFERENCE—USE OF WRONG MAP.—Equity has jurisdiction to correct a mistake in a decree in partition, by setting it aside, and making a re-partition, where the mistake was extrinsic and collateral to the questions examined and determined in the original action for partition, and led the court to do what it did not intend to do, in confirming to the plaintiffs a piece of land not described or referred to in the complaint, or in the findings or interlocutory judgment, and which was not included in the title to the land sought to be partitioned, but was owned and possessed adversely by one not a party to the action, it appearing that the mistake originated in an incorrect use made by the referees of the lines indicated upon a second official map of the city then in force, which showed different boundaries of the lot sought to be partitioned from those fixed by a prior official map which was referred to in the grant made by the city, under which the title to the lot sought to be partitioned was deraigned, and under which the partition ought to have been made.

ID.—CONCEALED MISTAKE—DISCOVERY—REASONABLE DILIGENCE—LACHES NOT IMPUTABLE.—The plaintiffs are not barred by delay and laches from maintaining a suit in equity to set aside the final decree of partition on the ground of mistake, brought within one year after the decree was entered, where it appears that there was nothing in the report of the referees, or in the record of the action for partition, or in the final decree, to indicate the mistake, but it was concealed by reference to

the lands described in the complaint, and, without fault or negligence of the plaintiffs, was not discovered until after their remedy by motion or other legal process in the original action had expired, and that as soon as they received information which led them to suspect it, they took immediate steps to ascertain the facts, and employed counsel to prosecute the suit in equity.

Id.—PLEADING—DEMURRER TO COMPLAINT—PARTIES.—A demurrer to the complaint in equity for failure to state a cause of action, and for a defect or misjoinder of parties defendant, is properly overruled, where the complaint states all the facts necessary to constitute a cause of action for relief in equity, and further stated that the parties therein named, plaintiffs and defendants, comprised all persons who owned, or claimed an interest in the pueblo lot of which partition was made, or any part thereof, or whose rights or interests were in any way affected by the decree in partition, or by the action to set it aside.

Id.—EXCHANGE OF QUITCLAIM DEEDS—MUTUAL MISTAKE—WANT OF CONSIDERATION—ANNULMENT—RE-PARTITION—FORM OF DECREE.—Where the plaintiffs executed a quitclaim deed for a small portion of the lands claimed by them in exchange for a like deed from the appellant for a parcel of land outside of the lot of which partition was sought, and to which appellant had no valid claim or title, and it appeared that the deeds were exchanged by mutual mistake, and that plaintiff's deed was without any consideration, and the court sets out in its findings all the facts necessary to annul the deeds, and in the judgment of re-partition, decreed an allotment to each of the parties of the land originally owned by such party, it is not necessary that there should be a formal annulment of the deeds in the judgment, but it had the effect to vacate and set aside the deeds, and was sufficient in form.

APPEAL from a judgment of the Superior Court of San Diego County and from an order denying a new trial. W. L. Pierce, Judge.

The facts are stated in the opinion.

Withington & Carter, and Parrish & Mossholder, for Appellants.

W. A. Sloane, for Plaintiffs, Respondents.

Wadham & Stearns, for Charles A. Lumsden, Defendant and Respondent.

BELCHER, C.—On January 6, 1888, Lillian Cullen commenced an action in the superior court of San Diego county against J. C. Sprigg, the plaintiffs in this action and others, for the partition of lot 1111 of the pueblo lands of the city of San

Diego, "as shown and delineated upon the official map thereof made by Charles H. Poole, C. E. and U. S. deputy surveyor, and known as the Poole map." The plaintiffs here did not appear in that action, and their defaults were entered. The case was tried, and the court found that the parties to the action were the owners of certain described portions of the said lot, the plaintiffs here owning ten and eighty-five one hundredths acres thereof, which was a strip situated along the east line of the lot, and was two hundred and ten feet wide. In the findings the "said lot" and the "Poole map" are frequently referred to. In accordance with the findings, an interlocutory judgment was entered, directing "that the aforesaid pueblo lot be partitioned and set apart in severalty to the parties thereto, the plaintiff, intervenor, and defendants in this suit, in the proportions determined in this judgment and the findings of fact filed herein"; and certain named persons were appointed to make the partition. From that judgment and an order denying a new trial the plaintiff in the action appealed to this court, where the judgment and order were affirmed. (*Cullen v. Sprigg*, 83 Cal. 56.) In deciding the case it was said: "The rights of the respondents depend upon their deraignment of title from the city under two deeds from the trustees of the city dated March 1, 1869, to William Evans, one for 'that lot of land containing sixty acres lying in block No. 1111, according to the official map of said city made by Charles H. Poole, A. D. 1856,' and the other for 'that lot of land containing forty acres lying in block 1111,' according to the same map."

After that decision was rendered, the referees proceeded to make the partition, and reported their proceedings to the court, as required by section 785 of the Code of Civil Procedure. The report was approved and confirmed by the court, and a final decree in partition was made and entered April 20, 1894. The decree recited that the report of the "referees, heretofore appointed by an order of this court to make partition of the lands in the complaint herein described," had been filed and confirmed, "by which it appears that said referees have made partition of the said premises described in the complaint in this action and in the interlocutory decree herein entered and filed on the seventeenth day of December, 1888."

It was not shown by the report or the decree, but was subse-

quently discovered, that in making the partition the referees used, and followed the lines laid down upon a map known as the Pascoe map. This map located the east line of lot 1111 some two hundred and ten feet further east than it was located by the Poole map, and it was this strip between these two lines which was allotted to the plaintiffs herein as their portion of the said premises. But it appears that the said strip had been sold to one Veasy, who was not a party to the partition suit, as a portion of lot 1110 according to the Poole map, and had been inclosed, occupied, and claimed by him, as against all the world, for about ten years.

Within a year after the said final decree was entered, the plaintiffs commenced this action to have the same vacated and set aside and a new partition made, upon the ground that the referees and the court, by mistake and inadvertence, failed to allot or set apart to them, or either of them, any part or interest whatever of or in the lands of said pueblo lot 1111, of which partition was ordered and adjudged, but did allot and set apart to them land in an adjoining lot, to which they had and could thereby acquire no title.

The case was tried, and the court found, among other things, that all the averments of the complaint were true, and gave judgment in favor of the plaintiffs as prayed for. From that judgment and an order denying a new trial the defendants have appealed.

It is not claimed by the appellants that the plaintiffs were not the owners of an interest in the land to be partitioned equal to ten and eighty-five one hundredths acres thereof, or that under the final decree they acquired or could assert any right or title to the parcel allotted to them; but the contention is: 1. That plaintiffs were not entitled to have the partition made according to the Poole map; 2. That they were not entitled to the relief sought, because the action was brought to annul a former decree upon inadequate grounds; 3. That if the action were a proper one, still plaintiffs had lost their right to maintain it by their own laches.

1. Should the partition have been made according to the Poole map? It appears that the Poole map was filed in the office of the city clerk in 1856, and was indorsed: Official map of the pueblo

lands of the city of San Diego, compiled from all existing authorities under directions of the board of trustees for the years 1855 and 1856. By Chas. H. Poole, C. E., U. S. Dep. Surveyor." It also appears that in 1870 another map of the pueblo lands of the city was made by James Pascoe, which, on August 11th of that year, by a resolution of the board of trustees of the city, was formally adopted as the official map of said pueblo lands. O. N. Sanford, civil engineer, testified that after 1870 the Pascoe map was the official map of the city, "but conveyances after that date calling for the official map of the city often meant the Poole map." It further appears that the plaintiffs deraigned their title through mesne conveyances from one William Evans, to whom, in March, 1869, the city of San Diego conveyed "one hundred acres undivided in and of said pueblo lot 1111 as shown upon the map of said pueblo lands, made by Charles H. Poole in 1856," the whole lot containing one hundred and seven and sixty-seven one hundredths acres of land. And the court found "that thereafter in said year 1869 the said city of San Diego sold and conveyed its title in and to all of the lands of said pueblo lot 1111, by reference to and as designated on said Poole map."

Under the circumstances shown, we think it clear that the partition was intended to be made, and should have been made, according to the Poole map, and that the failure to so make it was due alone to the mistake and inadvertence of the referees.

2. Had the court below jurisdiction and authority to set aside the decree in partition and to grant the relief prayed for? Appellants invoke the rule of *res adjudicata*, and insist that the decree was final and conclusive. (Citing *Pico v. Cohn*, 91 Cal. 129; 25 Am. St. Rep. 159; *United States v. Throckmorton*, 98 U. S. 113, and other cases.)

That a party against whom an unjust judgment has been obtained through accident, mistake, or fraud may, in certain cases, maintain an equitable action to set aside the judgment is well settled. (*Bibend v. Kreutz*, 20 Cal. 110; *Senter v. Senter*, 70 Cal. 619; *Dunlap v. Steere*, 92 Cal. 344; 27 Am. St. Rep. 143.)

In *Pico v. Cohn*, *supra*, it is said: "That a former judgment or decree may be set aside and annulled for some frauds there can be no question; but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think

it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court had been imposed upon."

The same rule applies to mistakes, and to judgments or decrees in partition as well as other judgments. "A final judgment or decree in partition is not more exempt from the interference and controlling power of courts of equity than are final judgments and decrees in other cases. Hence, such a mistake of facts, or such accident as would authorize a court of equity in enjoining or setting aside an ordinary judgment, will authorize it to set aside or correct a judgment or decree of partition. . . . If a mistake in matters of description has been made by the commissioners in drafting their report, and has also been carried into the final judgment, it may be corrected by proceedings in equity." (Freeman on Cotenancy and Partition, sec. 534; *Smith v. Butler*, 11 Or. 46; *Marvin v. Marvin*, 52 How. Pr. 97; *Wilbur v. Dyer*, 39 Me. 169; *Douglass v. Viele*, 3 Sand. Ch. 439.)

"The mistake which will justify this relief may also be the mistake of the court. But wherever it may be found that inadvertence or mistake is held to be ground for setting aside a judgment, it will be noticed that it is not a mistake of the law, or an inadvertent conclusion as to what the law is, but a mistake or inadvertence in doing something not intended to be done." (1 Black on Judgments, sec. 335.)

Was the mistake here complained of such a one as a court of equity will relieve against? We think it was. It was clearly extrinsic and collateral to the questions examined and determined in the action, and led the court to do what it evidently never intended to do—that is, to confirm to the plaintiffs a piece of land not described or referred to in the complaint or in the findings or interlocutory judgment, and which was then owned and in the adverse possession of one not a party to the suit.

3. Were the plaintiffs barred from maintaining the action be-

cause of their delay and laches in commencing it? Upon this question the court below found the facts as follows:

"8. That there was nothing in the report of said referees, or in the record of said action for partition, or in said final decree, to show or indicate that a mistake had been made, but, on the contrary, it appeared from said report, record, and decree that said plaintiffs were allotted, and had assigned to them, the tract of land within said pueblo lot 1111 designated in the calls of the deeds from their grantors and by the findings of the court in said action for partition.

"9. That said plaintiffs relied upon the correctness of the survey and report of said referees and the decree of said court, and upon representations that said survey was correct, which were made to them at the time immediately following said final decree, by said referees, and by the attorney for plaintiff in said partition suit, and by surveyors familiar with said lands; and because of said reliance, and without any fault or negligence on their part, or on the part of either of them, for a long time, and until after their remedy by motion or other legal process had expired by lapse of time, did not discover or suspect that said mistake or any mistake had been made in said survey and partition.

"10. That as soon as plaintiffs received information which led them to suspect that said mistake had been made, they employed counsel to prosecute this action, and took immediate steps to ascertain the facts regarding the true boundaries of said pueblo lot 1111, and at all times used reasonable diligence in the commencement and prosecution of this action, and that such delay as occurred after the discovery of the facts which led plaintiffs to doubt the correctness of said survey and partition, was necessarily occasioned because of conflicting surveys of said pueblo lands, and because the uncertainty as to the location of established corners and monuments made it a difficult and intricate matter, requiring much time and research, to locate the true boundary lines of said pueblo lot 1111."

These findings were justified by the evidence, and are, we think, a sufficient answer to appellants' contention on this point.

4. There was no error in overruling the demurrer to the complaint. That pleading stated all the facts necessary to constitute a cause of action, and it did not appear upon the face thereof that

there was a defect or misjoinder of parties defendant. On the contrary, the complaint stated "that the parties herein named, plaintiffs and defendants, comprise all persons who own or claim an interest in said pueblo lot 1111, or any part thereof, or whose rights or interests are in any way affected by said decree of partition, or by this action."

5. It appears that after the interlocutory judgment was entered, but before the final decree, plaintiffs executed to the appellant, the College Hill Land Association, a quitclaim deed for a small portion of the lands claimed by them, and the said association executed to them a like deed for a parcel of land outside of the said lot, and to which it had no claim or title. The court found, in effect, that the plaintiffs' deed was made by mutual mistake, and contrary to the purpose and intent of the parties thereto, and without any consideration; and that, in fact, plaintiffs had at no time conveyed or parted with their title and interest in said pueblo lot 1111, or any part thereof. Counsel for appellants object that no formal decision or order setting aside the said deeds was made, and that the judgment is silent as to them. But the court sets out in its findings all the facts necessary to annul the deeds, and in its judgment decrees an allotment to each party of the land originally owned by such party. This had the effect to vacate and set aside the deeds, and was sufficient.

It results from what has been said that we find nothing in the record calling for a reversal, and that the judgment and order appealed from should be affirmed.

Haynes, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

[Crim. No. 254. Department Two.—November 1, 1897.]

THE PEOPLE, Respondent, v. STEVE WADE, Appellant.

CRIMINAL LAW—TRIAL—CONTINUANCE—ABSENCE OF WITNESSES—INSUFFICIENT SHOWING—DISCRETION.—Affidavits for a continuance of a criminal cause, for the absence of material witnesses for the defendant, which merely show an unsuccessful search for the witnesses, and do not name the whereabouts of any of them, except one who was stated upon information and belief to be somewhere in Mexico, and do not show that the attendance of any one of them would or could be procured within any reasonable time, are not sufficient to establish an abuse of the discretion of the court in denying the motion.

ID.—SEDUCTION UNDER PROMISE OF MARRIAGE—CORROBORATION OF PROSECUTRIX—CONSTRUCTION OF CODE.—The evidence of the prosecutrix, whether corroborated or not, if believed by the jury and the judge who presided at the trial, is sufficient to justify a verdict of guilty of the crime of seducing and having sexual intercourse with an unmarried female of previous chaste character, under promise of marriage, under section 268 of the Penal Code; and section 1108 of the same code, which provides that upon a trial for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of twenty-five years, for the purpose of prostitution, the defendant cannot be convicted upon the testimony of the woman upon whom or with whom the offense was committed, unless she is corroborated by other evidence, has no application to offenses committed in violation of section 268.

ID.—EVIDENCE—PROOF OF CHASTE CHARACTER—LIMITATION AS TO TIME.—The proof of the chaste character of the prosecutrix is properly limited to the time prior to the alleged seduction, and there is no error in striking out a question and answer designed to prove that she never had sexual intercourse with any other man than the defendant.

ID.—TESTIMONY OF ACQUAINTANCE OF PROSECUTRIX.—A witness of whose family the prosecutrix had been a member, and who had had occasion to be well acquainted with her, may be properly asked what, from his acquaintance with her and his observations of her general conduct, he would say as to whether or not she was a chaste and virtuous girl prior to the time of the alleged seduction.

ID.—IMPEACHMENT OF WITNESS—CONTRADICTORY STATEMENTS—NECESSITY OF LAYING FOUNDATION.—A witness cannot be impeached by proof of statements inconsistent with his testimony, unless the foundation is first laid therefor, by relating the statements to him, with the circumstances of times, places, and persons present, and asking him whether he made such statements, and, if so, allowing him to explain them.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. George H. Buck, Judge.

The facts are stated in the opinion.

William A. Bowden, for Appellant.

W. F. Fitzgerald, Attorney General, and C. N. Post, Deputy Attorney General, for Respondent.

BELCHER, C.—The defendant was charged with the crime of seducing an unmarried female of previous chaste character, under promise of marriage. He was convicted and sentenced to pay a fine of three thousand dollars, and in default of payment to be imprisoned one day for each four dollars of the fine, until the same is satisfied. From that judgment and an order denying his motion for a new trial he has appealed.

1. When the case was called for trial, the defendant moved for a continuance, and in support of his motion read and filed seven affidavits made by him. The motion was denied, and this ruling is assigned as error.

Each of the said affidavits named a person who, it was said, would be a material witness for the defense, and stated what was expected to be proved by the witness. It then stated that a subpoena for the witness had been issued and placed in the hands of the sheriff for service, but returned, showing by the return indorsed thereon that after due search and diligent inquiry the officer had been unable to find the said witness in his county. In six of the affidavits the affiant stated that he had personally made search and diligent inquiry for the witnesses named therein, but such search had been unsuccessful. In one of the affidavits the affiant stated he was informed and believed that the witness named therein was in the republic of Mexico. The whereabouts of no one of the persons named, except the one who was somewhere in Mexico, is shown, and it does not appear that the attendance of any one of them would or could be procured within any reasonable time. Under such circumstances, it cannot be said that the court abused its discretion in denying the motion. (*Harper v. Lamping*, 33 Cal. 641; *People v. Ah Fat*, 48 Cal. 61; *People v. Ah Yute*, 53 Cal. 614; *People v. Lewis*, 64 Cal. 401.)

2. It is claimed that the verdict was not justified by the evidence, because the testimony of the prosecutrix was not corroborated by other evidence. The prosecution was based upon section 268 of the Penal Code, which provides: "Every person who, under promise of marriage, seduces and has sexual intercourse with an

unmarried female of previous chaste character is punishable," etc. Section 1108 of the same code also provides: "Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of twenty-five years, for the purpose of prostitution, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence."

To sustain his contention defendant relies upon the last-named section, but obviously that section has no application to offenses committed in violation of the one first named.

The evidence of the prosecutrix, if believed by the jury and the judge who presided at the trial, as it must have been, was amply sufficient to justify the verdict; and, besides, it was in fact corroborated in several respects. The judgment cannot, therefore, be disturbed on this ground.

3. Several rulings of the court on the admission of evidence are complained of, but we see no material error in any of them.

The prosecutrix was asked on cross-examination: "Miss Scott, you never had sexual intercourse with any other man?" and answered, "No, sir." This question and answer were stricken out, and she was then asked: "You never had sexual intercourse with any other man previous to the month of April, 1894?" (the month of the alleged seduction), and answered, "No, sir."

The inquiry was properly limited to the time prior to the seduction, and there was no error in striking out the first question and answer.

F. S. Jones was a witness for the prosecution, and testified that Miss Scott had lived at his house for three months and been a member of his family, and he had had occasion to get pretty well acquainted with her. He was then asked: "From your acquaintance with Miss Scott and your observation of her general conduct, what would you say as to whether or not she was a chaste and virtuous girl up to the time of your acquaintance and prior to the middle of April, 1894?" The question was objected to as incompetent, irrelevant, and immaterial, and the objection was overruled. The witness answered: "I never saw anything imprudent in Miss Scott; she seemed to be a nice young girl."

The question was proper, and certainly defendant was not prejudiced by the ruling.

Lottie Curtis was a witness for the prosecution, and testified that she knew Miss Scott intimately and frequently called on her at Mrs. Barstow's. She was asked if she always found her at home there, and answered, "No, sir. I called there one evening, Miss Jones and I, and Mrs. Barstow said she went out riding with Steve Wade." Counsel for defendant urge that the court erred in denying his motion to strike out the said answer, but the record shows that the answer was in fact stricken out by the court.

Mary Olmstead and Alfred C. Parker were called as witnesses for the defendant, and were examined on his behalf very fully. It is said in defendant's brief that "the testimony given by the witnesses Olmstead and Parker was hostile evidence, which took the defendant by surprise, and which he had the right to impeach by showing that they had made other and contradictory statements."

To impeach the witnesses W. A. Bowden, defendant's attorney, took the stand as a witness, and offered to testify that each of the said witnesses had made statements to him before the trial which were contradictory to those made by them at the trial. This offered testimony was objected to and excluded, and it is insisted that the ruling was erroneous.

Section 2049 of the Code of Civil Procedure provides: "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section 2052."

And section 2052 provides: "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but, before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and, if so, allowed to explain them."

No such foundation was laid for the impeaching testimony offered, and therefore it was properly rejected.

The above are all the points made for a reversal, and, as no one of them can be sustained, the judgment and order appealed from should be affirmed.

Haynes, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[L. A. No. 227. Department Two.—November 2, 1897.]

V. L. WARD, Administrator etc. of James K. Kelley, Deceased,
Respondent, v. FRANK L. CRANE et al., Appellants.

MECHANIC'S LIEN—DESCRIPTION OF WORK—ERECTION OF BUILDING.—Where the work for which a claim of lien was filed consisted of the almost entire demolition of an old house, and the building of a substantially new structure in its place, it is sufficient to describe the work in the claim as the "erection" of a house, although a small part of the old building was embodied in the new.

ID.—COMPLETION OF WORK—DISCHARGE OF CONTRACTOR.—Where a mechanic, engaged by the day to erect a building, under the control of the owner, is discharged by him when the work was on the verge of full and actual completion, the owner undertaking to finish it, such discharge is equivalent to an acceptance of the work as a completed contract for the erection of the building, and the notice of lien may be properly filed at any time within thirty days thereafter.

ID.—FORECLOSURE OF LIEN—FINDING—SIZE OF LOT—USE AND OCCUPATION.—In an action to foreclose a mechanic's lien, a finding, following the allegation of the complaint, on which no issue was raised by the answer, that all the lot on which the building was erected was necessary to the "convenient use and enjoyment" thereof, will be construed to mean "convenient use and occupation," and, in the absence of evidence as to the size of the lot, it will be presumed, in support of the judgment, that the whole of it is necessary for the convenient use and occupation of the dwelling.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. J. W. McKinley, Judge.

The facts are stated in the opinion.

M. C. Hester, for Appellants.

W. S. Wright, for Respondent.

HAYNES, C.—Action to foreclose a mechanic's lien. The defendants employed Kelley to do the carpenter work hereinafter specified at an agreed compensation of two dollars and fifty cents per day. His labor amounted to one hundred and five dollars, of which forty dollars has been paid, leaving due the sum of sixty-five dollars, for which he filed a lien.

Kelley died after the cause was tried, and his administrator was substituted. Findings and judgment were for the plaintiff, and this appeal is from an order denying defendants' motion for a new trial, which motion is based upon the alleged insufficiency of the evidence to justify certain findings, and that the court erred in receiving in evidence the claim of lien filed by the plaintiff.

1. It is contended by appellants that the finding that plaintiff performed the labor, for which a lien is claimed, in the "erection" of a house, is not justified by the evidence.

There is no controversy as to the amount and value of the labor performed by Kelley, but it is said this work was done in "the alteration and repair of an old house," and not in the "erection" of a house, as alleged in the complaint and stated in the notice of lien. The answer of defendants is a denial that the work was performed in the "erection" of any house. As to the character of the work done by him Mr. Kelley testified: "The work was done upon the house of the said Cranes in Pasadena. We tore away the south, east, and west sides of the old house, and put up an addition ten feet wide on the south side. The roof of the old building was removed and a new one put on over the old part and the addition, but the floor was not taken up, but was enlarged and raised by putting in underpinning. I made the new house twenty-five feet in width instead of fifteen; added a kitchen eight feet by twelve feet in the rear, and a porch twenty feet by eight feet on the front. All the partitions were new. The ceiling joists were all new. It was lathed and plastered, and the old house was not."

Mr. Witham, a contractor and builder, said: "The building was an old building remodeled."

George Anderson testified that plaintiff "tore away all of the old house except the north side and a part of the back side and floor. I think all of the front side was removed." The evidence for the defendants was substantially the same. We think the finding that the work was performed in "the erection of a dwell-

ing-house" was sustained by the evidence. There is no controversy or uncertainty as to the building upon which the labor was performed, nor as to the labor having been performed, nor as to the stipulated wages, or the amount remaining unpaid; and defendants, therefore, could not have been misled by the averment in the complaint and the statement in the notice of lien that the work was performed in the "erection" of the building. When the old building was practically destroyed by tearing off the roof and the upper joists, leaving only two sides and a patch of floor, it could not properly be termed a building; and, if not, the work performed by respondent might properly be characterized as the erection of a building. Our conclusion is not inconsistent with the case of *Eaton v. Malatesta*, 92 Cal. 75, cited by appellant. That action was for work done and materials furnished, as alleged in the complaint, for the erection of a certain building upon certain land, while the evidence showed without conflict that the contract, and the work performed under it, was to raise up, move back, and repair two houses, and furnish material therefor; and it was held the proofs did not conform to the contract alleged in the complaint or to the notice of lien. The distinction between that case and this is obvious.

What we have said above disposes of appellant's second point, viz., that the court erred in admitting in evidence plaintiff's notice of lien, the objection being that it claimed a lien for labor performed "in the erection of said dwelling-house," instead of in the repair of the house.

It is further contended that the fifth finding, to the effect that the lien was filed within thirty days after the completion of the building, is not justified by the evidence.

In the fourth finding it was expressly found that the building was completed on the eleventh day of January, 1894, and the fifth finding also finds that the notice of lien was filed on January 31, 1894.

As to the date at which the building was completed there is a material conflict in the evidence. The plaintiff testified that "The building was substantially finished when I left [January 11, 1894], and was completed by the middle of January, 1894."

The plaintiff further testified in substance that when he quit work they were out of lumber, and there was only a few feet more

required to complete the work; that Mr. Crane told him there was no more for him to do, and that he, Crane, would put in the balance of the boards in the rear of the house along the base below the floor, and that there was about a half day's work to finish the painting, which was being done by Mr. Crane. If this evidence would be sufficient to sustain the finding in the absence of conflicting evidence, we cannot disturb it, and we think it is. Plaintiff was working by the day, was under the control of defendants, and was discharged by them when the work was on the verge of full and actual completion.

Such discharge, under the circumstances stated, was an acceptance of the work as a completed contract for the erection of the building, and the notice of lien might be properly filed at any time within thirty days thereafter.

Appellants further contend that their motion for a new trial should have been granted because the court found that "all of said realty is necessary for the convenient use and enjoyment of said building."

The property is described as "lot forty-two (42) of a resubdivision of E. Turner's tract, according to a map of said tract." The complaint, by inadvertence, doubtless, used the expression "convenient use and enjoyment," instead of the language of the statute, "convenient use and occupation."

No issue was taken by the answer upon this allegation of the complaint, nor was there any evidence as to the size of the lot.

It is argued that there is a wide difference between the words "enjoyment" and "occupation"; that a much larger parcel of land might be required for the former than the latter, and that hence the finding and decree may embrace more land than is authorized by the statute.

We see no material distinction between the two words in this connection. In *Tunis v. Lakeport etc. Assn.*, 98 Cal. 286, it was said: "The expression, 'the land upon which any building . . . is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof,' should be construed to mean such space or area of land as is necessary to the enjoyment of the building for the purpose in view in its construction"; thus using the word "enjoyment" as synonymous with occupation. Besides, in the ab-

sence of evidence as to the size of the lot, it will be presumed, in support of the judgment, that the whole of it is necessary for the convenient use and occupation of the dwelling. (*Sacks v. Auburn*, 95 Cal. 650.)

The order denying a new trial should be affirmed.

Chipman, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the order denying a new trial is affirmed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 662. Department Two.—November 2, 1897.]

COUNTY OF SONOMA, Respondent, v. SAMUEL CROZIER,
Appellant.

EMINENT DOMAIN—CONDEMNING LAND FOR PRIVATE WAY—ACTION BY COUNTY—INSUFFICIENT COMPLAINT.—A complaint in an action by a county to condemn the land of the defendant for a private way, which merely avers the filing of a sufficient petition and the giving and approval of the bond, and that afterward such proceedings were had that, on a day specified, the board of supervisors of the county, by order duly given and made, directed the district attorney to institute condemnation proceedings, but which fails to state that viewers were appointed, or that they proceeded to lay out the road, or that they made or filed any report, or that the report was approved, or that damages awarded had been tendered to defendant and refused by him, fails to state a cause of action.

LD.—JURISDICTION OF BOARD—COMPLIANCE WITH STATUTE ESSENTIAL—EFFECT OF ORDER DIRECTING SUIT—CONSTRUCTION OF CODE.—A complaint in condemnation proceedings must show that the board had jurisdiction to make the order for the institution of condemnation proceedings; and unless the board complies with the requirements of the statute its orders are void; and section 2690 of the Political Code, which makes the order for the institution of the suit conclusive as to the regularity thereof, must be understood as providing that when the board has jurisdiction mere irregularities are harmless, and not as providing that the board can make a valid order opening a road over private property without a substantial compliance with the requirements of the code.

APPEAL from a judgment of the Superior Court of the County of Sonoma. R. F. Crawford, Judge.

The facts are stated in the opinion of the court.

Wickliffe Matthews, for Appellant.

Emmet Seawell, District Attorney, and T. J. Butts, Assistant District Attorney, for Respondent.

TEMPLE, J.—This is a proceeding to condemn a strip of land for a private way, and the case is presented on a demurrer to the complaint. The demurrer was overruled, and the defendant did not answer. Judgment went against him, and he now appeals, resting on his demurrer.

The complaint avers the filing of a sufficient petition and the giving and approval of the bond, and that afterward such proceedings were had that on the ninth day of October, 1895, the board of supervisors of said county, by order duly given and made, directed the district attorney, etc.

The complaint fails to state: 1. That viewers were appointed; 2. That they proceeded to lay out the road: 3. That they made or filed any report; 4. That the report was approved; or 5. That damages awarded had been tendered to defendant and refused by him.

The respondent contends that these allegations are not necessary because section 2690 of the Political Code makes the order directing suit to be brought conclusive as to the regularity thereof, and directs the court then to proceed without reference to the proceedings before the board.

But it must appear that the board had jurisdiction to make the order, otherwise it is simply waste paper and not an order at all. It has been repeatedly held that the board must comply with the statute, otherwise its orders are void. It cannot be possible that a property owner can be put to the expense of a suit for condemnation, when a judgment can amount to nothing but the imposition of costs on all parties concerned; for if the proceedings are void there would be no road. Or, if it be contended that the subsequent order opening the road would be valid, although there had been no proceedings before the board except the filing of a petition and the approval of a bond, then it might become so without giving a property owner the opportunity to be heard, which is guaranteed by the statute. If we were to concede that the legis-

lature might have provided for laying out a road without giving the owners an opportunity to be heard otherwise than in the suit for condemnation, still such is not the mode adopted. The final order opening the road is void unless all the requirements of the statute have been substantially complied with, and the order directing the condemnation suit must be equally so.

There is no claim that this is a "determination" of a board which can be pleaded as provided in section 456 of the Code of Civil Procedure. Relying upon *Los Angeles County v. San Jose etc. Co.*, 96 Cal. 93, counsel contend that the order directing the condemnation suit was conclusive as to the regularity of all the proceedings up to that time. Even the legislature cannot prevent one who is sued in the name of the county from objecting that the suit is unauthorized. In the case cited, it is said that the statute simply prescribes a rule of evidence. In *County of Siskiyou v. Gamlich*, 110 Cal. 94, it is said: "To make out a *prima facie* case, it was only incumbent upon the plaintiff to prove the presentation of a regular petition to the board of supervisors, with a good and sufficient bond, the record of the board showing the appointment of viewers, the report of the viewers in proper form, and its approval, the assessment of damages, and the setting apart out of the proper fund of the money awarded to the defendant, his refusal for ten days to accept the same, and the order to commence the suit for condemnation."

The case relied upon by the respondent is cited as authority for this proposition. If it is necessary to prove these facts they should be alleged, and section 2690 of the Political Code must be understood as providing that when the board has jurisdiction mere irregularities are harmless, but it does not provide that the board can make a valid order opening a road over private property without a substantial compliance with the requirements of the code.

The judgment is reversed, and the court is directed to sustain the demurrer.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 736. Department Two.—November 2, 1897.]

MICHALITSCHKE BROTHERS AND COMPANY, Respondents, v. WELLS, FARGO AND COMPANY, Appellants.

COMMON CARRIERS—SEALED PACKAGES—FAILURE TO STATE VALUE—RECEIPT LIMITING LIABILITY.—A stipulation in a receipt given by a common carrier for a sealed package stating that the common carrier shall not be held liable for any amount exceeding fifty dollars for loss or damage on any shipment, unless its true value is stated therein, is valid, and exonerates the carrier from greater liability for loss, when the value of the property is not named, in all cases not involving gross negligence, fraud, or willful wrong on the part of the carrier or his servant.

ID.—CONSTRUCTION OF STIPULATION—AGREEMENT AS TO VALUE.—A stipulation limiting the liability of the carrier to a specified sum in case of loss or damage, where the value of a package is not stated, does not constitute an agreement as to the value of the package, but the implication is to the contrary. [Per Temple, J., and Henshaw, J. McFarland, J., contra.]

ID.—CONSTRUCTION OF CODE—POWER OF CARRIER TO LIMIT LIABILITY—EXCEPTIONS.—Sections 2175 and 2176 of the Civil Code must be read together, and, as so read, the law is that a carrier may limit his liability for packages, the value of which is not stated, except when the loss or damage results from the gross negligence, fraud, or willful wrong of himself or his servant; and for loss or damage so caused, he cannot thus exonerate himself. [Per Temple, J., and Henshaw, J. McFarland, J., contra.]

ID.—ACTION FOR LOSS BY CARRIER—PLEADING—ANSWER—NEW MATTER—LIMITATION OF LIABILITY.—In an action against a common carrier to recover the value of goods shipped, but not delivered, a stipulation relieving the carrier from its ordinary liability for the actual value of the goods, and specially limiting its liability beyond a specified sum, is new matter constituting a defense within the meaning of section 437 of the Code of Civil Procedure, and must be specially pleaded; and it is error to sustain a demurrer to such defense.

ID.—PLEADING—NEGLECTENCE—GROSS NEGLIGENCE.—A complaint averring merely that the defendant "wrongfully and negligently failed to deliver" certain packages committed to it as a common carrier, does not show that the loss occurred through "gross negligence" within the meaning of section 2175 of the Civil Code.

ID.—GROSS NEGLIGENCE, MATTER OF EVIDENCE IN REPLY.—Gross negligence is matter of evidence in reply to the defense of a stipulation limiting the liability of a common carrier, and of replication in pleading; and the law permits proof of it as though it were pleaded by a replication; and, upon proof of it, the plaintiff is entitled to recover the value of the packages which the defendant failed to deliver, notwithstanding the stipulation. [Per Temple, J., and Henshaw, J. McFarland, J., contra.]

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. A. A. Sanderson, Judge.

The facts are stated in the opinion of Mr. Justice McFarland.

E. S. Pillsbury, for Appellant.

By the acceptance of the receipt with the knowledge of its terms, the plaintiffs are held to have assented and agreed to all the terms and conditions therein contained, including the condition limiting the liability in case of loss to a specified sum, which is a valid and binding contract. (*Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, 175, 188; *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117; 1 Am. Rep. 131; *Belger v. Dinsmore*, 51 N. Y. 166; 10 Am. Rep. 575; *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62; 18 Am. Rep. 596; *Ballou v. Earle*, 17 R. I. 441; 33 Am. St. Rep. 881; *Pacific Exp. Co. v. Foley*, 46 Kan. 457; 26 Am. St. Rep. 107; *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331; *Durgin v. American Exp. Co.*, 66 N. H. 277; *Smith v. American Exp. Co.*, (Mich. 1896), 66 N. W. Rep. 479; *Brehme v. Adams Exp. Co.*, 25 Md. 328; *Graves v. Lake Shore etc. R. R. Co.*, 137 Mass. 33; 50 Am. Rep. 282; *Zimmer v. New York Cent. etc. R. R.*, 137 N. Y. 460; *St. Louis etc. Ry. Co. v. Weakly*, 50 Ark. 397; 7 Am. St. Rep. 104; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 397; *N. Y. C. R. R. Co. v. Lockwood*, 17 Wall. 357; *Tyly v. Morrice*, Carth. 485; *Gibbon v. Paynton*, 4 Burr. 2298; *Clay v. Willan*, 1 H. Black. 298; *Clarke v. Gray*, 6 East, 564; *Nicholson v. Willan*, 5 East, 507; Civ. Code, sec. 2176; *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311; *California Powder Works v. Atlantic etc. R. R. Co.*, 113 Cal. 329.) The limitation of liability to the sum specified is valid and binding, even in cases of actual negligence. (*Hart v. Pennsylvania R. R. Co.*, *supra*; *Primrose v. Western Union Tel. Co.*, 154 U. S. 15; *Hill v. Boston etc. R. R. Co.*, 144 Mass. 284; *Zimmer v. New York etc. R. R. Co.*, *supra*; *Smith v. American Exp. Co.*, *supra*; *Pacific Exp. Co. v. Foley*, *supra*; *Ballou v. Earle*, *supra*; *Brehme v. Adams Exp. Co.*, *supra*; *Duntley v. Boston etc. R. R. Co.*, 66 N. H. 263; 49 Am. St. Rep. 610; *Durgin v. American Exp. Co.*, *supra*; *St. Louis etc. Ry. Co. v. Weakly*, *supra*; *Zouch v. Chesapeake etc. Ry. Co.*, 36 W. Va. 524; *Richmond etc.*

R. R. Co. v. Payne, 86 Va. 481; *Louisville etc. R. R. v. Sherrod*, 84 Ala. 178; *Western Ry. Co. v. Harwell*, 91 Ala. 340; *Greenhood on Public Policy*, 517.) The contract limiting the liability was new matter, and properly pleaded as such. (*Missouri Pac. R. R. Co. v. Wichita etc. Co.*, 55 Kan. 525; *Atchison etc. R. R. Co. v. Ditmars*, 3 Kan. App. 459; *Atchison etc. R. R. Co. v. Bryan* (Tex. Civ. App. 1895), 28 S. W. Rep. 98.) The allegation of negligence in the complaint added nothing to the cause of action, and presented no material issue. (*Jackson v. Sacramento Valley R. R. Co.*, 23 Cal. 268; *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11, 26; 85 Am. Dec. 211; *Bohannon v. Hammond*, 42 Cal. 227; *Knowles v. Seale*, 64 Cal. 377; *Louvall v. Gridley*, 70 Cal. 507; *Malone v. County of Del Norte*, 77 Cal. 217.) Under the Civil Code it requires "gross negligence" to except the carrier from limited liability, which is distinct from mere "negligence." (Civ. Code, sec. 2175; *Redington v. Pacific Postal etc. Co.*, 107 Cal. 317; 48 Am. St. Rep. 132.) It does not require an expressly stipulated value in order to the limiting of liability to a specified amount, where no value is stated. (*Pacific Exp. Co. v. Foley*, *supra*; *St. Louis etc. Ry. Co. v. Weakly*, *supra*; *Zouck v. Chesapeake etc. Ry. Co.*, *supra*; *Richmond etc. R. R. Co. v. Payne*, *supra*; *Western Ry. Co. v. Harwell*, *supra*; *South etc. R. R. Co. v. Henlein*, 52 Ala. 606; 23 Am. Rep. 578; *Calderon v. Atlas Steamship Co.*, 69 Fed. Rep. 574; *Squire v. New York etc. R. R. Co.*, 98 Mass. 239; 93 Am. Dec. 162; *Clarke v. Gray*, *supra*; *Nicholson v. Willan*, *supra*; Civ. Code, sec. 2176.) Knowledge of the nature of the goods shipped is immaterial. (*Levi v. Waterhouse*, 1 Price, 280; *Marsh v. Horne*, 5 Barn. & C. 322.)

Vogelsang & Brown, for Respondents.

The sustaining of the demurrer was not prejudicial, because the facts pleaded could have been proved under the general issue. (*Brown v. Kentfield*, 50 Cal. 129; *Colorado etc. R. R. Co. v. Blake*, 3 Colo. 417, 418; *Illinois Cent. R. R. Co. v. Johnson*, 34 Ill. 393; *Vaden v. Ellis*, 18 Ark. 355; *Chambers County v. Clews*, 21 Wall. 317; *Ohio etc. Ry. Co. v. Nickless*, 73 Ind. 382.) The defendant could not stipulate for exemption from the consequences of its own negligence. (*Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331-38; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174;

N. Y. C. R. R. Co. v. Lockwood, 17 Wall. 357; *Liverpool etc. Co. v. Phenix Ins. Co.*, 129 U. S. 397.) In the following cases cited by appellant, excluding liability, even in case of negligence, there was an expressly stipulated value: *Ballou v. Earle*, 17 R. I. 441; 33 Am. St. Rep. 881; *Durgin v. American Exp. Co.*, 66 N. H. 277; *Smith v. American Exp. Co.*, 66 N. W. Rep. 479; *Brehme v. Adams Exp. Co.*, 25 Md. 334, 335; *Zimmer v. New York etc. R. R. Co.*, 137 N. Y. 460, 462; *Hart v. Pennsylvania R. R. Co.*, *supra*; *Western Ry. Co. v. Harwell*, 91 Ala. 340. The rule must be confined to cases of misrepresentation of value, or an agreed value, estopping the shipper. (*L. & N. R. Co. v. Wynn*, 88 Tenn. 320.) The receipt is not an agreement of value, and is not a defense to an action based on negligence. (*Eells v. St. Louis Ry. Co.*, 52 Fed. Rep. 903; *Scruggs v. Baltimore etc. R. R. Co.*, 18 Fed. Rep. 318; *Schwarzchild v. National S. S. Co.*, 74 Fed. Rep. 257, 259; *Railway Co. v. Wynn*, *supra*.) In the absence of an agreed value expressly named or an actual inquiry made under the facts presented in this case, the carrier is deemed to have waived a statement of valuation. (*Rathbone v. New York etc. R. R. Co.*, 140 N. Y. 48, 52, 53; *Orndorff v. Adams Exp. Co.*, 3 Bush, 194, 197; 96 Am. Dec. 207; *Lawson on Carriers*, sec. 93, pp. 93, 94. See *Galt v. Adams Exp. Co.*, McAr. & M. 124.) Under section 2175 of the Civil Code, the law precludes the carrier from contracting beforehand in favor of its exoneration from liability for gross negligence. The weight of modern authority holds that the term "gross" is merely a vituperative epithet, and, after all, the expression means only the absence of the care that is requisite under the circumstances. (*Wilson v. Brett*, 11 Mees. & W. 113; *Wild v. Pickford*, 8 Mees. & W. 443; *Sager v. Portsmouth R. R. Co.*, 31 Me. 236; 50 Am. Dec. 659; *N. Y. C. R. R. Co. v. Lockwood*, 17 Wall. 357; 16 Am. & Eng. Ency. of Law, 426, 427; *Campbell on Negligence*, sec. 11; *Lawson on Carriers*, secs. 129, 130, pp. 162-68; *Civ. Code*, Deering's ann. ed., sec. 2175, note on Gross Negligence.)

McFARIAND, J.—It is averred in the complaint that plaintiffs, through their agents Seidenberg & Co., delivered to defendant at the city of New York four certain packages of cigars, of the

value of six hundred and twenty-five dollars which defendant, a common carrier, received and agreed to deliver to plaintiff at the city of San Francisco; that defendant wrongfully and negligently failed to deliver said cigars to plaintiffs, to their damage in the sum of six hundred and twenty-five dollars and interest.

The defendant in its answer denied the averments of the complaint, and also set up a separate defense, to which plaintiffs interposed a general demurrer. Judgment was rendered for plaintiffs for six hundred and twenty-five dollars, which was the full value of the cigars, and defendant appeals from the judgment, bringing up only the judgment-roll. The question presented is, whether or not the court erred in sustaining the said demurrer.

In that part of the answer to which the demurrer was sustained it is averred that the four packages were received by appellant to be carried and delivered to respondents at San Francisco upon the terms and conditions stated in a certain written contract of carriage accepted by respondents at the time the packages were received by appellant. The contract is set out and made part of the answer; and that part of it which is material here is as follows: "Received from Seidenberg & Co. four (4) pkgs. said to contain cigars, valued at ———. Addressed, Michalitschke Bros. & Co., San Francisco, Cal. . . . Wells, Fargo & Company shall not be held liable for loss or damage . . . for any amount exceeding fifty dollars on any shipment unless its true value is herein stated." It is further averred in the answer (substantially) that at the time of accepting said contract respondents had full knowledge of the terms of said contract; that the true, or any, value of the contents of said packages, or of either of them, was never named or stated to appellant, and appellant had no knowledge thereof until after they had been destroyed by fire; that appellant believed that the value of any one of said packages did not exceed fifty dollars, and, acting on that belief, made a reduced charge for their transportation; and that appellant would have made the regular charge for transportation, which would have been greater than the one charged, if it had known that the value of the contents of the packages was as great as that stated in the complaint. By the answer appellant admitted its liability in the sum of two hundred dollars—fifty dollars for each package—and offered to allow respondents to take judgment for that amount.

The demurrer should have been overruled. If the averments in the answer as to the separate defense be true, then a judgment based upon a valuation of the cigars exceeding fifty dollars a package could not be sustained. We presume that the demurrer was sustained upon the grounds that a common carrier cannot, by contract with a customer, relieve himself from responsibility for his own negligence, and that the contract set up in the answer is void because contrary to legal policy. But the rule established by the weight of the authorities is, that where goods done up in packages are received by a carrier for transportation he cannot be held responsible, in case of loss, for damages beyond the value of the goods as agreed upon with the shipper; and, furthermore, that an instrument in writing such as that set up in the answer, and made under the circumstances therein detailed, constitutes a contract as to such value. This rule is fair and just. It would be unreasonable for a shipper to expect his packages to be carried for a compensation based upon an agreed valuation much less than the actual value, and then, in case of loss, recover the full value. As common carriers are insurers, and are liable for all losses, whether caused by their negligence or not, except those which are the result of an act of God or a public enemy, they are certainly entitled to know the value of goods concealed in packages; and where, in such a case, the shipper agrees to a certain value, he should not be heard, in case of loss, to claim a greater value. Such a contract is fair and reasonable, and is not contrary to public policy. It is not a contract which relieves the carrier from responsibility for his own misbehavior; he is liable in case of loss for the value of the packages as agreed to by the shipper, and upon which value he pays a reduced compensation for the carriage. Limitation as to value does not excuse negligence. In *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 341, the supreme court of the United States, after declaring that such a contract is not a violation of public policy, say: "On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and repudiate it in case of loss."

We do not deem it necessary to cite here the numerous English

and American authorities with which counsel for appellant has enriched his briefs, and which support the above statement of the law, for our own code fully declares the rule above stated. We will simply cite the following out of the many cases, both ancient and modern, referred to in the briefs. (*Tily v. Morrice*, Carth. 485; *Nicholson v. Willan*, 5 East, 507; *Hart v. Pennsylvania R. R. Co.*, *supra*; *Prinrose v. Western Union Tel. Co.*, 154 U. S. 15; *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311.)

The proposition that respondents by accepting the receipt contracted that appellant should not be liable for more than fifty dollars for each package, unless the value was stated in the instrument, is amply sustained by the authorities cited by appellant; but we need not review those authorities, because that proposition, as well as the general rule above stated, is expressly declared by the Civil Code of this state. Section 2176 of that code—leaving out matters not pertinent here—is as follows: “A consignor or consignee, by accepting a bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated; and also to the limitation stated therein upon the amount of the carrier’s liability in case property carried in packages, trunks, or boxes is lost or injured when the value of such property is not named.” This provision is not changed or modified by section 2175 or 2200, or by any other section of the code.

Respondents’ contention that appellant could have proved its second or separate defense under its general denials of the averments of the complaint, and that, therefore, it was not injured by the sustaining of the demurrer, is not maintainable. At common law, a great many things could be proven under the general issue; but under our system a special defense must be specially pleaded, and a general denial puts in issue only the material averments of the complaint. In the case at bar, only the reception of the goods by the carrier, their loss and their actual value, were at issue under the general denial; and as to the issue of value the appellant, under that denial, could only have proven, if he had been able to do so, that the real value was less than the amount stated in the complaint. It could not have proved that it was not to be liable for the full value if such value turned out to be more than that named in the special contract. Its ordinary liability as

a common carrier was that stated in the complaint; and a special contract which relieved it from that liability was "new matter constituting a defense" within the meaning of section 437 of the Code of Civil Procedure. (*Piercy v. Sabin*, 10 Cal. 22; 70 Am. Dec. 692; *Glazer v. Clift*, 10 Cal. 304; *Coles v. Soulsby*, 21 Cal. 47; *McGuire v. Quintana*, 52 Cal. 427; *McCreery v. Duane*, 52 Cal. 262; *Etcheborne v. Auzeais*, 45 Cal. 125; *Perine v. Teague*, 66 Cal. 446; *Missouri Pac. R. R. Co. v. Wichita etc. Co.*, 55 Kan. 525; *Atchison etc. R. R. Co. v. Ditmars*, 3 Kan. App. 459; *Atchison etc. R. R. Co. v. Bryan* (Tex. Civ. App. 1895), 28 S. W. Rep. 98.)

Respondents lay stress upon the fact that the court found that the goods were lost "through the negligence of the defendant"; but we do not see how this finding has, in the case at bar, any significance. In the first place, the case comes here upon a ruling which sustained a demurrer to the answer; and, if it be at all material to inquire if the loss was caused by the negligence of the carrier, it is averred in the answer that the goods were destroyed by fire "without any carelessness or negligence whatever on the part of defendant." In the second place, the averment and finding of negligence were immaterial and surplusage. The general liability of the appellant as a common carrier would be the same whether guilty of negligence or not; and when there is a special contract, such as that set up in the answer, the measure of liability is not changed by the fact that the carrier's negligence caused the loss. In *Hart v. Pennsylvania Ry. Co.*, *supra* (approved in *Primrose v. Western Union Tel. Co.*, *supra*), the United States supreme court, speaking of such a contract, say: "Even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." Section 2175 of the Civil Code has no application here; the court did not find "gross" negligence, and, moreover, by the contract the carrier did not attempt to exonerate itself from gross negligence, or from any negligence. The contract merely dealt with the value of the packages for which appellant was to be absolutely responsible, in case of loss, as an insurer.

We cannot presume, as respondents ask us to do, that notwithstanding the sustaining of the demurrer, the appellant offered evidence of the matters averred in the answer, that the respondents did not object, or that if they did object, the court erroneously overruled their objections. The doctrine of intendments in favor of a judgment cannot be stretched that far.

The judgment is reversed, with direction to the court below to overrule the demurrer to the answer.

TEMPLE J., concurring.—I concur in the judgment, but I do not agree that the conditions expressed in the bill of lading amount to an agreement as to the value of the packages. I think the implication is exactly the reverse, to wit, that because the value is not stated and is therefore unknown, the carrier will not be liable for loss or damage for any sum exceeding fifty dollars. For this reason this case is not within the cases cited upon this subject by Mr. Justice McFarland.

I do not question the proposition that a common carrier is exonerated by such a stipulation, except in the cases mentioned in section 2175 of the Civil Code. Sections 2175 and 2176 must be read together, and, so read, the law is that a carrier may limit his liability for packages, the value of which is not stated, except when the loss or damage results from the gross negligence, fraud, or willful wrong of himself or his servant; and for loss or damage so caused he cannot thus exonerate himself.

It may be true that to agree upon the value of the goods to be carried is not to limit the liability of the carrier, and, hence, the materiality of the consideration here. I contend, as already stated, that the agreement here not only is not an agreement as to the value, but plainly implies that no such agreement has been made.

The complaint does not show that the loss occurred through the "gross" negligence of the defendant. I do not see how under the code we can say that there is no difference between "negligence" and "gross negligence." Had gross negligence been averred, the averment could not have been held immaterial, save upon the theory that proof of such negligence would be matter of rebuttal in evidence and of replication in pleading, and I think such is the case.

The defendant is charged with the violation of its duty as a common carrier. The answer sets up a special contract, limiting

its liability. I think this plea was necessary, and that the demurrer was improperly sustained. Had the demurrer been overruled, the law would have permitted proof of gross negligence, as though it had been pleaded by a replication, and, in case such gross negligence had been shown, in my opinion the plaintiff would have been entitled to recover.

Henshaw, J., concurred.

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AGENCY.

1. **CONTRACTS—CHARTER OF BARGES FOR USE OF DREDGE COMPANY—EXECUTION BY PRESIDENT—COPARTNERSHIP—PAROL EVIDENCE.**—Where one of the members of a copartnership doing business under a corporate name having his surname in its title, chartered barges expressly for the use of the copartnership, and designated himself in the charter and in the signature thereof as president of such company, the evidences upon the face of the charter that it was designed to be the contract of the copartnership, if not sufficiently clear of themselves to prove it as matter of law, are, at least, sufficient to warrant parol evidence to show that the company was bound by the terms of the contract as principal. (*Southern Pacific Company v. Von Schmidt Dredge Company*, 367.)
2. **PRINCIPAL AND AGENT—DESIGNATION OF AGENCY IN WRITTEN CONTRACT—EVIDENCE—DISTINCTION ABOLISHED.**—The distinction at common law between sealed and unsealed instruments, as to the effect of words of agency appended to the name of a contracting party in the body and signature of the contract, is abolished in this state, and the rule as to simple contracts is applicable, that words of agency employed in the written contract are to be regarded, not as descriptive merely, but as importing character and capacity; and, where the reading of the contract, however inartificially it may be drawn, discloses that it is executed for or on behalf of a principal, or even leaves the matter in doubt, parol evidence may be used to determine whose contract it is, and this even in cases where the instrument is sufficiently clear in its terms to bind the agent personally. (*Id.*)
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APPEAL.

1. **APPEALS IN SPECIAL CASES—CONSTITUTIONAL LAW—JUDICIAL 'CONSTRUCTION OF FORMER CONSTITUTION—RE-ENACTMENT—ACQUIESCENCE.**—The former constitution having been judicially construed to empower the legislature to provide for appeals to the supreme court in special civil proceedings of a summary character, its language, re-enacted in the present constitution, will be concluded to have been adopted with the interpretation and construction which the courts had enunciated; and where the construction of the present constitution has been fixed by long acquiescence and sanction both of the legislature and of the courts in favor of the right of appeal in special cases, it cannot be open for decision to the contrary as a new question. (*Morton v. Broderick*, 474.)

APPEAL (Continued).

2. **JUDGMENT REMOVING BOARD OF SUPERVISORS—EFFECT OF APPEAL—SUSPENSION OF JUDGMENT—RESTORATION OF LEGAL RIGHT.**—An appeal to the supreme court from a judgment removing a board of supervisors for neglect to fix water rates at the required time *ipso facto* operates as a *superedeas*, and suspends the effect of the judgment, so as to restore the board to its right to continue in office until the final determination of the appeal. (Id.)
3. **APPOINTMENT AND QUALIFICATION OF NEW BOARD IMMATERIAL—RIGHT OF INCUMBENCY OF APPEALING BOARD.**—The fact that a new board of supervisors was appointed, qualified, and met and organized after the announcement of the decision, and before the entry of judgment removing the board of supervisors, and the taking of an appeal therefrom, is immaterial, and cannot affect the legal right of the appealing board to retain the incumbency of the office, where it appears that on the day of the entry of the judgment of removal it immediately perfected an appeal, and continued thereafter to act as a board of supervisors. (Id.)
4. **ORDER REFUSING TO STRIKE OUT COST BILL—UNAUTHORIZED STAY BOND—IMPROPER JUDGMENT UPON MOTION AGAINST SURETIES.**—An order denying defendant's motion to strike out plaintiff's cost bill is not an "order directing the payment of money" within the purview of section 942 of the Code of Civil Procedure; and a bond executed in double the amount of the cost bill upon appeal from such order by the defendant, has no statutory authority, and cannot operate to stay execution; and the plaintiff is not entitled to judgment against the sureties thereon, upon motion, that being a summary remedy created by the statute, and applicable only to undertakings allowed by it. (Reay v. Butler, 113.)
5. **STIPULATION FOR JUDGMENT UPON MOTION.**—A stipulation inserted in such bond agreeing that judgment might be entered against the sureties upon motion, being required by the statute, in case of an effective stay bond, cannot operate to make the bond which is ineffectual as a stay, because made in a case not provided by statute, effective to bind the sureties to summary judgment against themselves. (Id.)
6. **FAILURE TO FILE TRANSCRIPT—UNSETTLED BILL OF EXCEPTIONS—NEGLECT OF APPELLANT—DISMISSAL.**—It is the duty of a party seeking to avail himself of a bill of exceptions, for the purpose of review upon appeal, to take whatever steps may be necessary to procure its settlement; and since the judge who tried the case is not required and cannot be compelled to settle the bill, after his term of office has expired, it is necessary to apply to this court for an order directing its settlement; and where no steps are taken within a reasonable time to secure the settlement of the bill of exceptions, the appeal will be dismissed upon motion of the respondent for failure to file the transcript within the time limited therefor. (Estate of Depeaux, 522.)
7. **JUDGMENT—FINDINGS—PRESUMPTION OF WAIVER.**—On an appeal from the judgment on the judgment-roll alone, all intendments are in its favor, and error must be affirmatively shown; and where the record is silent upon the subject, a waiver of findings will be pre-

APPEAL (Continued).

sumed, and, if not waived, the fact must affirmatively appear by a bill of exceptions. (*Leadbetter v. Lake*, 515.)

8. **JURY TRIAL—PRESUMPTION OF WAIVER.**—Where the judgment recites that the cause was regularly heard before the court sitting without a jury, and it nowhere appears in the record that the appellant demanded a jury, the presumption is that a jury was waived. (*Id.*)
9. **COSTS—DEFENDANTS JOINTLY SUED.**—A joint judgment for costs in favor of defendants who were jointly sued, but who separately answered, is proper. (*Id.*)
10. **DISMISSAL—FAILURE TO SERVE ADVERSE PARTY—PRACTICE.**—The consideration of a motion to dismiss an appeal for the alleged failure to serve the notice of appeal upon one claiming to be an adverse party, will be continued until the hearing of the appeal, when the determination of the motion involves an examination of the entire record, and incidentally of the merits of the appeal, and the motion was not made until after the appellant had filed his points and authorities upon the appeal. (*Hibernia Savings and Loan Society v. Behnke*, 498.)
11. **MOTION OF RESPONDENT FOR REVERSAL—PARTIAL CONFESSION OF ERRORS.**—On an appeal upon a judgment-roll containing a bill of exceptions in which there are many exceptions to the rulings of the court at the trial, not conceded by the respondent to be erroneous, and it is also claimed by the appellant that upon the findings of fact, judgment should have been rendered in appellant's favor, the respondent ought not to be allowed to foreclose an examination of the record, after the parties have had an opportunity to be heard upon the merits, by a confession of errors in certain particulars only, and a motion of respondent for reversal of the judgment, and that the cause be remanded for a new trial, upon such partial confession of errors, must be denied. (*Sun Insurance Company v. White*, 468.)
12. **TRIAL OF ISSUES NOT MADE—ESTOPPEL—INSUFFICIENT RECORD—DISREGARD OF FINDING.**—The rule that parties who have voluntarily tried issues not properly made are estopped from urging upon appeal that they were not made applies only where the record shows that the party against whom the estoppel is invoked consciously participated or acquiesced in the trial of the issue as if it had been made, or diverted his attention from the fact that it was not made, and from supplying or curing the defect in his pleading by amendment; and where the evidence is not brought up, and no facts are shown in the record from which an equitable estoppel can be inferred against the respondent, and it does not appear but that respondent may have objected to evidence outside of the issues, a finding of matter not included in the issues must be disregarded. (*Rudel v. Los Angeles Co.*, 231.)
13. **PRESUMPTION UPON APPEAL—ERROR NOT PRESUMED.**—Presumption upon appeal may be made in favor of the regularity of judgments; but without an affirmative showing error cannot be presumed for the purpose of reversal. (*Id.*)
14. **ORDER REFUSING TO HEAR MOTION TO SET ASIDE ORDER DENYING NEW TRIAL—JURISDICTION—APPEAL—DISMISSAL.**—After appeal from an order

APPEAL (Continued).

denying a new trial, the subject matter of that order is removed from the jurisdiction of the superior court, and, while such appeal is pending, it has no jurisdiction to change such order; nor is an order refusing to hear a motion to set aside a former order denying a new trial appealable, and an appeal therefrom must be dismissed.

See Contempt; Criminal Law, 2, 3, 8, 14, 23, 77; Deed, 1; Estates of Deceased Persons, 3-6; New Trial, 1, 2.

ASSAULT. See Criminal Law, 4-8.

ASSIGNMENT. See Contract, 6, 7, 9; Partnership.

ATTORNEY AT LAW. See Husband and Wife, 2; Mandamus.

ATTORNEY GENERAL.

1. **ACTION TO QUIET TITLE OF STATE—LANDS IN HARBOR OF OAKLAND AND ALAMEDA—AUTHORITY OF ATTORNEY GENERAL.**—The attorney general has authority to institute an action in any case in which the rights and interests of the people of the state are directly involved, without any new authority expressly conferred by law; and may institute an action to quiet the title of the state to lands in navigable waters constituting the harbor of the cities of Oakland and Alameda, and to determine adverse claims made thereto. (*People v. Oakland Water Front Company*, 234.)
2. **MODE OF TESTING AUTHORITY OF ATTORNEY GENERAL—DEMURRER—WANT OF CAPACITY TO SUE—MOTION TO DISMISS.**—The question as to the authority of the attorney general to sue in the name of the state is not properly presented by a demurrer for want of capacity in the plaintiff to sue; but the proper practice is to move to dismiss the information on the ground, among others, that the attorney general had no authority or power to institute or prosecute the proceeding in the name of the state. (*Id.*)
3. **JURISDICTIONAL QUESTION—JUDICIAL NOTICE.**—The authority of the attorney general to sue in the name of the state presents a jurisdictional question; and the court is bound to take judicial notice, whether he has or has not authority to institute the proceeding under the constitution and laws of the state. (*Id.*)

BANKS.

1. **DRAFT RECEIVED FOR COLLECTION—NEGLIGENCE.**—A bank which receives for collection a draft drawn upon another bank, acts as agent for such collection, and is bound to exercise reasonable care and diligence as well in the employment of its subagents as in the discharge of any other of the duties assumed by it. If, in making the collection, it follows the course usually taken by banks under similar circumstances, it cannot be held to have been negligent. (*Davis v. First National Bank of Fresno*, 600.)
2. **IDENTIFICATION OF SIGNATURE OF PAYEE—SENDING DRAFT TO DRAWER—USAGE OF BANKS.**—If the payee and his signature were unknown to the collecting bank, and it had no reason to believe that the drawee had

BANKS (Continued).

knowledge thereof, the question whether or not it was negligent in sending the draft to the drawer for identification is one of fact for the jury: and in an action against the collecting bank to recover the value of the draft on account of its negligence in so sending it, evidence is admissible that the conduct of the bank was in accordance with the usage of banks when making collections of paper presented by persons who were unknown to them. (Id.)

3. **KNOWLEDGE OF USAGE.**—One who gives a draft to a bank to collect is held to have an implied knowledge of its usage in collecting drafts, so far as such usage does not contravene any rule of law. (Id.)
4. **ATTACHMENT OF DRAFT.**—If the failure to collect the draft or to return it to the payee was due to its attachment in legal proceeding against the payee, at the place at which it was drawn, such fact would tend to exonerate the collecting bank from negligence, and evidence thereof should have been admitted in the action against it. (Id.)
5. **INSTRUCTIONS—NEW TRIAL.**—In such an action, where evidence had been given on behalf of the defendant tending to show that it had been authorized by the payee to send the draft to the drawer for identification, an instruction that if the jury found such to be the fact, the defendant was not liable for any loss thereby resulting, and an instruction that “under the evidence there was no need of the defendant forwarding the draft to any place for the purpose of having the signature identified, for it was the duty of the bank upon receiving the draft for collection to have forwarded it for collection to the place where by its terms it was made payable,” are conflicting, and the effect of the latter instruction being to neutralize the former, a new trial should be granted. (Id.)

See Mortgage, 2.

BENEFIT SOCIETY. See Mutual Benefit Society.

BENICIA. See Water Front, 17-19.

BILL OF EXCEPTIONS.

AMENDMENT OF SETTLED BILL OF EXCEPTIONS OR STATEMENT OF CASE—JURISDICTION OF SUPERIOR COURT—LIMITATION—CONSTRUCTION OF CODE—MOTION IN SUPREME COURT.—The presentation and settlement of a bill of exceptions or statement of the case is a “proceeding,” within the provisions of section 473 of the Code of Civil Procedure, an application to amend or correct which, after settlement, is governed by and must be made within the limitation prescribed by that section; and when such application is made in the superior court more than six months from the date of the certificate of settlement, that court is without power to allow an amendment or correction of the bill of exceptions or statement, and its order denying the application cannot be disturbed upon motion of the appellant in the supreme court to compel such correction. (Sprigg v. Barber, 591.)

See Appeal, 6; Criminal Law, 3; Estates of Deceased Persons, 5.

BOUNDARIES. See Water Front, 1-4.

BURGLARY. See Criminal Law, 9-11.

CERTIORARI.

1. **JUSTICE'S JUDGMENT—DEFAULT—DEMURRER—NOTICE OF HEARING—RECORD PROOF OF SERVICE—SUPPLEMENTAL EVIDENCE OF CONSTABLE—DISPROOF OF RECORD BY ATTORNEY INADMISSIBLE.**—Where a judgment was rendered by default in a justices' court after an appearance and filing of a demurrer by an attorney for the defendant, and the overruling of the same, and the expiration of time to answer thereafter, and the docket showed that notice of hearing of the demurrer was issued three days before the hearing, and was returned and filed on that day, bearing an indorsement of receipt of a copy of the notice with blank date, purporting to be signed by the attorney for the defendant, followed by the memorandum "Served H. H. Y.," upon certiorari to review the judgment, though it may be proper to admit proof supplemental to the record to show that the memorandum bore the initials of the constable who served the notice, and that two days before the hearing he delivered the copy of the notice to a man in the office of defendant's attorney, who signed the attorney's name to the acknowledgment of service, yet evidence of such attorney is not admissible to impeach the record of service, by disproving the authority of the person in his office to make the acknowledgment, and denying that he in fact received notice of the hearing. (*City of Los Angeles v. Young*, 295.)
2. **REVIEW OF FACTS UPON CERTIORARI—EVIDENCE—PROVINCE OF WRIT—TRIAL OF FACTS DE NOVO NOT PERMITTED.**—Upon certiorari, if it becomes necessary for the court of review to be put in possession of the facts upon which the court below acted, and which are not technically of record, it is competent for that court to require the lower court to certify such facts in its return to the writ, and its statement of facts is part of the record, and it seems that upon this principle the court of review may hear evidence supplemental to the record, in aid of the jurisdiction appearing from the record: but the province of the writ being to review the record of an inferior court, board, or tribunal, and to determine therefrom whether it has exceeded its jurisdiction, its inquiry into the evidence is limited to that upon which the inferior tribunal acted; and where its jurisdiction depended upon a question of fact, that question cannot be tried *de novo* upon its merits, nor can evidence *dehors* the record and contradicting it, to show want of jurisdiction, ever be permitted. (*Id.*)

CHARTER PARTY. See Agency.

COMMON CARRIERS.

1. **SEALED PACKAGES—FAILURE TO STATE VALUE—RECEIPT LIMITING LIABILITY.**—A stipulation in a receipt given by a common carrier for a sealed package stating that the common carrier shall not be held liable for any amount exceeding fifty dollars for loss or damage on any shipment, unless its true value is stated therein, is valid, and exonerates the carrier from greater liability for loss, when the value of the property is not named, in all cases not involving gross negligence, fraud, or willful wrong on the part of the carrier or his servant. (*Michalitschke Brothers & Co. v. Wells, Fargo & Co.*, 683.)

COMMON CARRIERS (Continued).

2. **CONSTRUCTION OF STIPULATION—AGREEMENT AS TO VALUE.**—A stipulation limiting the liability of the carrier to a specified sum in case of loss or damage, where the value of a package is not stated, does not constitute an agreement as to the value of the package, but the implication is to the contrary. [Per Temple, J., and Henshaw, J. McFarland, J., contra.] (Id.)
3. **CONSTRUCTION OF CODE—POWER OF CARRIER TO LIMIT LIABILITY—EXCEPTIONS.**—Sections 2175 and 2176 of the Civil Code must be read together, and, as so read, the law is that a carrier may limit his liability for packages, the value of which is not stated, except when the loss or damage results from the gross negligence, fraud, or willful wrong of himself or his servant; and for loss or damage so caused, he cannot thus exonerate himself. [Per Temple, J., and Henshaw, J. McFarland, J., contra.] (Id.)
4. **ACTION FOR LOSS BY CARRIER—PLEADING—ANSWER—NEW MATTER—LIMITATION OF LIABILITY.**—In an action against a common carrier to recover the value of goods shipped, but not delivered, a stipulation relieving the carrier from its ordinary liability for the actual value of the goods, and specially limiting its liability beyond a specified sum, is new matter constituting a defense within the meaning of section 437 of the Code of Civil Procedure, and must be specially pleaded; and it is error to sustain a demurrer to such defense. (Id.)
5. **PLEADING—NEGLIGENCE—GROSS NEGLIGENCE.**—A complaint averring merely that the defendant "wrongfully and negligently failed to deliver" certain packages committed to it as a common carrier, does not show that the loss occurred through "gross negligence" within the meaning of section 2175 of the Civil Code. (Id.)
6. **GROSS NEGLIGENCE, MATTER OF EVIDENCE IN REPLY.**—Gross negligence is matter of evidence in reply to the defense of a stipulation limiting the liability of a common carrier, and of replication in pleading; and the law permits proof of it as though it were pleaded by a replication; and, upon proof of it, the plaintiff is entitled to recover the value of the packages which the defendant failed to deliver, notwithstanding the stipulation. [Per Temple, J., and Henshaw, J. McFarland, J., contra.] (Id.)

See Railroads.

CONSIDERATION.

1. **SALE AND LEASE BY BREWER—NOTES FOR PURCHASE MONEY—WANT OF CONSIDERATION—VIOLATION OF INTERNAL REVENUE LAWS—JUDGMENT OF FORFEITURE.**—In an action upon promissory notes given in consideration of the sale of personal property connected with a brewery, which was leased by the payee to the maker of the notes, an answer setting up that the vendor, prior to the sale and execution of the notes, had violated the internal revenue laws of the United States in the business of brewing and selling beer, and that on that account the personal property sold had become, and was, liable to seizure and sale, and was thereafter seized and subjected to a judgment of forfeiture for such violation, and that said notes

CONSIDERATION (Continued).

were executed and delivered without consideration, sets up a valid defense to the action. (*Kriess v. Faron*, 142.)

2. **PROCEEDINGS IN REM—PARTIES—CONCLUSIVENESS OF JUDGMENT AGAINST ABSENT OWNER—DEFAULT—DATE OF DIVESTITURE OF TITLE.**—Where proceedings for the forfeiture of property are *in rem*, all the world are deemed to be parties thereto, and are concluded by the judgment of forfeiture; and such judgment is conclusive evidence against the former owner of the property, for whose violation of the revenue laws the forfeiture was adjudged, although he was not served with process, and was absent from the state when the property was seized and the judgment was rendered, and though the judgment against the property was rendered by default and without proof; and such forfeiture must be deemed to have attached at the time of the commission of the offense, and to have divested the title of the owner as of that date, as against his subsequent vendees. (*Id.*)
3. **ACTION UPON NOTES—ISSUE AS TO WANT OF CONSIDERATION—FINDING AS TO FAILURE—CONCLUSION OF LAW.**—Where the answer in the action upon the notes given in consideration of the property adjudged to have been forfeited, pleaded all the facts as to the forfeiture, and set up want of consideration for the notes, and the court found all the facts touching the sale, the execution of the notes, the forfeiture, seizure, and sale of the property, and the proceedings in court after the seizure, its concluding finding, repeated in its conclusions of law, that the consideration for the notes wholly failed prior to their maturity, is but the finding of its conclusion of law from the facts specifically found, and as the judgment for the defendant is right upon the facts found, it will not be reversed on the ground that failure of consideration was not within the issues. (*Id.*)
4. **EVIDENCE—COLLECTION OF OUTSTANDING ACCOUNTS—IRRELEVANT PROOF.**—Where there is neither allegation nor evidence in an action upon promissory notes, that outstanding accounts in favor of the plaintiff were sold to the defendants, or formed any part of the consideration of the notes sued upon, there can be no recovery in the action for moneys collected upon said accounts, and evidence in reference to such outstanding accounts, and as to whether defendants had collected any of them, is inadmissible. (*Id.*)
5. **IMMATERIAL EVIDENCE—STATEMENT AS TO OWNERSHIP OF PROPERTY SOLD AND LEASED.**—A sale of property is in itself an assertion of ownership; and where the notes in suit were given in part payment for personal property purchased, which was connected with a brewery leased by plaintiff to defendants, a statement made by plaintiff, at the time of the sale and lease, that he was the owner of the property sold, and had a right to lease it, is immaterial, and an objection thereto is properly sustained. (*Id.*)
6. **PART PAYMENT—USE OF MATERIALS BEFORE SEIZURE.**—Where part of the property sold consisted of materials for making beer, which were used by defendants before the property was seized for forfeiture incurred by the vendor, and it appears that two hundred dollars were paid in cash on account of the purchase, and the notes in suit were for the residue of the purchase money, and it does not appear what the value of the materials was, and there is no action to recover its value, such use of the materials

CONSIDERATION (Continued).

does not affect the correctness of the findings and judgment as to want of consideration of the notes by reason of forfeiture of the property sold. (Id.)

See Findings, 1, 2; Insolvency, 1.

CONSPIRACY. See Criminal Law, 26-29.

CONSTITUTIONAL LAW.

PRIVATE PROPERTY NOT TO BE DAMAGED FOR PUBLIC USE WITHOUT COMPENSATION—POWER OF LEGISLATURE.—Under section 14 of article I of the constitution, private property cannot be taken or damaged for public use without just compensation having been first made to or paid into court for the owner; and the legislature cannot authorize a public use, the natural result of which will be to deprive the owner of property of its beneficial use, without compensation to the party injured. (*Rudel v. Los Angeles Co.*, 281.)

See Appeal, 1; Consuls; Municipal Corporations, 2, 8; Public Officers, 1.

CONSULS.

1. **SUITS AGAINST—INTERNATIONAL LAW.**—The immunity of ambassadors and public ministers from suits in the courts of the country to which they are sent is not extended by any principle of international law to consuls. Their liability to suit within the United States is dependent upon the constitution of the United States and the legislation of Congress thereunder. (*Wilcox v. Luco*, 639.)
2. **JUDICIAL POWER OF UNITED STATES—JURISDICTION—CONCURRENT STATE JURISDICTION.**—The judicial power vested in the courts of the United States, by section 2 of article III of the federal constitution, is to be exercised in accordance with such legislation as Congress may prescribe. Wherever the constitution does not make this jurisdiction exclusive of state authority, it may be made so by Congress, and Congress may also declare the extent to which the state courts may exercise concurrent jurisdiction, as well as at what stage of procedure the jurisdiction of the United States courts may attach in cases originally commenced in the state courts. (Id.)
3. **ORIGINAL JURISDICTION OF SUPREME COURT.**—The provision of section 2 of article III of the federal constitution, giving to the supreme court of the United States "original" jurisdiction in all cases affecting consuls, does not make that jurisdiction exclusive, nor does the provision extending the judicial power of the United States to "all cases" arising under the constitution and laws of the United States make the jurisdiction of the federal courts necessarily exclusive. (Id.)
4. **CONCURRENT JURISDICTION OF STATE COURTS.**—Under subdivision 8 of section 711 of the United States Revised Statutes, as originally enacted, the United States courts had exclusive jurisdiction of all suits or proceedings against consuls. But by the act of February 8, 1875, such section was amended by striking out subdivision 8, and since

CONSULS (Continued).

that amendment the state courts have concurrent jurisdiction of such actions or proceedings. (Id.)

5. **RIGHT OF FEDERAL INTERFERENCE—WRIT OF ERROR.**—A consul cannot be deprived of the benefit of the provision of the constitution extending the judicial power of the United States to all cases in which he is affected, and unless there is some law by which he may invoke this judicial power for the purpose either of removing the cause into the courts of the United States before judgment, or to review the judgment of the state court, a state court can have no jurisdiction to entertain an action in which he is a defendant. Such law is found in section 709 of the Revised Statutes of the United States, providing for a writ of error to the supreme court of the United States from final judgments of the state courts in suits where is drawn in question the validity of a statute or of an authority exercised under any state, on the ground of their being repugnant to the constitution . . . of the United States. Under this section a consul sued in a state court, in addition to any defense he may have to the action, may claim his right under the constitution to have the matter determined by the courts of the United States; and if judgment is rendered against him in the state court, can have it reviewed by the supreme court of the United States, and the sufficiency of his defense determined by that tribunal. (Id.)

6. **WAIVER OF RIGHT—JUDGMENT BY DEFAULT.**—Such right, however, may be waived by a consul sued in a state court, either by merely pleading his defense to the cause of action without invoking this provision of the constitution, or by suffering default; and, if so waived, he cannot, after judgment has been rendered against him, claim the right to a review of this judgment under a writ of error by the supreme court of the United States. (Id.)

CONTEMPT.

1. **DISOBEDIENCE TO CORONER'S SUBPOENA—PUNISHMENT BY SUPERIOR COURT—JUDGMENT NOT APPEALABLE—DISMISSAL OF APPEAL.**—The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive; and, as a general rule, there is no appeal from a judgment or order adjudging one guilty of contempt; and where a coroner has adjudged a person guilty of contempt in disobeying a subpoena to appear at an inquest as a witness, an order thereupon made by the presiding judge of the superior court, that such person be imprisoned until he should testify before said coroner as directed by the latter, is not appealable, whether such order be viewed as within the general category of contempts, or as punishment for a misdemeanor, and an appeal therefrom will be dismissed. (People v. Kuhlman, 140.)
2. **JURISDICTION OF SUPERIOR COURT—UNLAWFUL IMPRISONMENT—REMEDY NOT BY APPEAL.**—The question whether the superior court had jurisdiction to make the order appealed from cannot affect the invalidity of an appeal therefrom; and if appellant is imprisoned unlawfully, he must pursue some remedy other than appeal. (Id.)

See Estates of Deceased Persons, 3.

CONTRACT.

1. **CONTRACT FOR CEMENT BULKHEAD—GUARANTY OF CONTRACTORS—NEGLIGENCE OF OWNER—PREMATURE FILLING OF BANK UPON UNHARDENED WALL—RECOVERY OF CONTRACT PRICE.**—Under a contract to construct a cement bulkhead, a guaranty of the work for five years against all defects arising through fault of workmanship or material, and that the wall would hold the bank unless undermined on the north side, is to be construed together, as not requiring the wall to hold the bank at all events, but only that it shall not fail to hold it by reason of defects of workmanship or material; and where the bulkhead was properly constructed according to contract, and the wall was strong enough to hold the bank, if it had been allowed to set and harden, as proposed by the contractors, but, through the negligent action of the owner, in prematurely filling in the bank, against the objection and protest of the contractors, while the wall was very green, the wall was caused to topple over, bulge out, and crack, the contractors are not liable upon their guaranty for failure of the wall to hold the bank, and may recover the contract price, and the owner cannot recoup any damages therefrom. (Gray v. Wells, 11.)
2. **FINDINGS—IMMATERIAL OMISSIONS.**—Where the court found that the work was done in a good, skillful, and workmanlike manner, and with sufficient and proper materials, and in all respects as required by the contract, the omission to find upon issues raised by the answer as to whether the wall was or was not undermined on the north side, and whether it became cracked in several places, sprung out of line, bulged out, and overhung the adjoining lot, so that it became and was utterly worthless, is rendered immaterial, and cannot be prejudicial error, or ground for reversal. (Id.)
3. **INTERFERENCE WITH WALL IN PROCESS OF CONSTRUCTION—SUPPORT OF FINDING.**—Where the court found that all defects in the wall were caused by the conduct and interference of the defendant "while the said wall was in process of construction," the finding is supported by evidence that defendant interfered by filling in the bank while the wall was green; and the wall cannot be said to have been fully constructed until the cement had had time to set and become hardened, so that any act during that time which caused injury to it may be properly treated as an act done during the process of construction. (Id.)
4. **HYPOTHETICAL FINDING AS TO DEFECTS—SURPLUSAGE—CONSISTENCY OF FINDINGS.**—A finding that the defects in the wall, "if any there were," was occasioned by the conduct and interference of defendant himself while said wall was in process of construction, construed in connection with other findings that the contractors fully performed the contract in a good, skillful, and workmanlike manner, and furnished the materials in all respects in accordance with the contract, and that defendant was not damaged by any act or omission of theirs, but that any damage he may have sustained was occasioned by reason of defendant's own conduct in interfering with the construction of the wall and changing the same from the plans upon which they agreed, desired, and sought to perform the work,

CONTRACT (Continued).

is to be construed as stating that whatever defects there were on the wall was caused by the defendant, and the words, "if any there were," may be disregarded as surplusage; nor is there any inconsistency in the findings. (Id.)

5. **CONTRACT PRICE—PROVISION FOR EXTRA WORK AT A SPECIFIED RATE—FINDINGS.**—Where the contract provided a fixed price of two hundred and fifty dollars for a concrete bulkhead, of specified dimensions, but also expressly provided that any extra concrete work in the wall was to be charged for at the rate of twenty-four cents per cubic foot, whatever extra work was performed by the contractors was part of the work done under the contract, and the agreed price therefor constitutes a part of the indebtedness which may be recovered under the contract, and where the court found that the contract had been performed in all respects according to its terms, and that under it defendant became indebted to the contractors in the sum of three hundred and twenty-five dollars, the finding is sufficient, without segregating the items for contract price and extra work, and finding specifically as to each; and where the evidence is conflicting as to whether extra work of the value of seventy-five dollars was performed, the findings and judgment will not be disturbed for insufficiency of the evidence as to the fact or value of extra work. (Id.)
6. **CONTRACT TO CONSTRUCT SEAWALL—SUBCONTRACT—RESERVED PERCENTAGE—ORDER UPON HARBOR COMMISSIONERS—CONDITION PRECEDENT—ABANDONMENT OF WORK—COMPLETION BY CONTRACTOR—RIGHTS OF ASSIGNEE.**—Where one who had contracted with the state board of harbor commissioners to construct part of the sea-wall, made a subcontract, agreeing that a residue of twenty-five per cent of the subcontract price was to be paid by an order drawn upon the harbor commissioners, to be held by a third person until the work was completed and accepted by them, and delivered to the subcontractor only on the faithful performance of the subcontract, and, if it was not performed as therein specified, the order was to be forfeited and returned to the contractor, who might complete the work at the expense of the subcontractor, the completion and acceptance of the work is a condition precedent to the payment of the reserved percentage, and upon abandonment of the work by the contracting company which made the subcontract before its final completion, it is not entitled to the order, or the money which it represents, and its assignee is in no better position, and is only entitled to such portion of the reserved percentage as might remain after deducting the expense incurred by the contractor in completing the work specified in the subcontract, and an assignee of that portion of the reserved percentage covered by such expense, acquires nothing by the assignment. (*Pacific Rolling Mill Company v. English*, 123.)
7. **CONSENT OF CONTRACTOR TO ASSIGNMENT OF RESERVED PERCENTAGE—CONDITIONS—SUBCONTRACT NOT MODIFIED.**—The written consent of the contractor to the assignment by the subcontractor of the reserved percentage, which is given expressly subject to the terms and conditions of the subcontract, and to the completion of the contract ac-

CONTRACT (Continued).

ording to the terms and conditions thereof, works no modification of the subcontract, and does not circumscribe the rights of the contractor, in case of a violation of the terms of the subcontract by the assignor; and the assignee takes the assignment *cum onere*. (Id.)

8. **LOSSES OF CONTRACTOR IN COMPLETING SUBCONTRACT—CONFLICTING EVIDENCE—APPEAL.**—Where the evidence is conflicting as to what losses were sustained by the contractor in completing the work specified in the subcontract upon abandonment thereof by the subcontractor, a new trial cannot be granted for failure of the evidence to support the findings as to the losses so sustained. (Id.)
9. **AMOUNT OF LOSS—VALUE OF LABOR—EXPERT EVIDENCE—STRIKING OUT EVIDENCE FOR APPELLANT—HARMLESS RULING.**—In an action by an assignee of the reserved percentage, where expert evidence was given for the defendant to show the value of certain labor charged for by the contractor in performing work which the subcontractor had covenanted but failed to perform, and experts testified for plaintiff in rebuttal that the labor was of considerably less value, the striking out such rebutting evidence is harmless, where it appears that if the lowest value testified to were accepted, the amount of loss of the contractor would still be largely in excess of all that portion of the reserved percentage assigned to plaintiff. (Id.)
10. **QUANTUM MERUIT—EVIDENCE—ARCHITECT'S SERVICES—EXPERTS.**—In an action to recover the reasonable value of services rendered by an architect in drawing and preparing plans and specifications for buildings proposed to be erected by the defendant, after evidence of value has been given by expert witnesses, it is error for the court to exclude evidence offered by the defendant as to the length of time it would take to draw the plans and specifications. In such a case, the jury, or court sitting as a jury, is not concluded by the testimony of the experts, or their estimates of value. (Ehlers v. Wannack Brothers, 310.)
11. **ALLEGATIONS OF SPECIAL CONTRACT.**—Where the complaint contains apt allegations of the reasonable value of the services rendered, and in addition alleges a special contract of employment, the failure to prove such special contract, and the finding of the court against the same, does not constitute a fatal variance. (Id.)
12. **CONDITIONAL PROMISE TO PAY—FINDINGS.**—An answer in such action setting up an agreement that the services were not to be paid for unless the defendants were able to secure a liquor license for the sale of liquor in the buildings, and their inability to secure the same, constitutes a defense, necessitating a finding thereon. And a mere finding that there was no agreement as to the amount to be paid for the services is insufficient. (Id.)
13. **ACTION TO ENJOIN BREACH OF CONTRACT—SALE OF BUSINESS AND GOODWILL BY RETIRING PARTNER—AGREEMENT NOT TO COMPETE—CROSS-COMPLAINT—DEMURRER—FRAUD—CONCEALMENT OF COMBINATION—TRUST AND MONOPOLY—RESCISSON.**—In an action brought by the members of a succeeding firm to enjoin a breach of a contract made by the retiring partner of a former firm upon the sale of his interest in the partnership property

and goodwill of the business to his copartner, one of the plaintiffs, in which he agreed that he would not establish, carry on, or conduct or maintain or act as agent for a like business, within the city and county, for a period of three years, a cross-complaint charging fraud in such sale committed by the purchasing partner, in the concealment of a combination, trust, and monopoly of the business effected by him with the other plaintiffs prior to the sale, which enhanced the value of the interest sold to the extent of seven thousand five hundred dollars, that the plaintiff thereby received more money for the partnership property when conveyed to the combination than he could otherwise obtain, and that all of the plaintiffs were aware of and took part in the fraud practiced upon cross-complainant, and praying for a rescission of the sale, and restitution of his rights as a partner in the former firm, and for the appointment of a receiver of the partnership property, is insufficient, and states no ground for relief, and a general demurrer thereto is properly sustained. (*Meyers v. Merillion*, 352.)

14. **ILLEGALITY OF TRUSTS AND MONOPOLIES—SHARE IN GAINS NOT RECOVERABLE—INSUFFICIENT PLEADING.**—Trusts and monopolies which design to control the prices of commodities are illegal as restraining freedom of trade, and destroying competition; and a pleading which seeks to share in the gains of an illegal trust and monopoly by averring that property sold by the pleader was enhanced in value by reason of the existence thereof, and that the pleader was deprived of such enhanced value by fraudulent concealment thereof by the purchaser, is devoid of merit, either as a ground of defense or of affirmative relief. (*Id.*)
15. **PARTICIPATION BY PLAINTIFFS OWING NO DUTY TO DEFENDANT—IMPROPER CHARGE OF FRAUD.**—The formation by defendant's former partner of a combination to control business and increase prices, made with the other plaintiffs, who owed no duty to the defendant, and were not bound to disclose to him any of their present or prospective business ventures, cannot justify a charge that the other plaintiffs participated in the alleged fraud of such former partner, in concealing the existence of such combination, and such charge, as against them, falls to the ground of its own weight. (*Id.*)
16. **RIGHTS OF THIRD PARTIES—RESCISSON NOT PERMISSIBLE—DAMAGES FOR FRAUD.**—Where the rights of third parties have intervened, and the circumstances of the parties to an alleged fraud have so far changed that rescission therefor may not be decreed without injury to such third parties and to their rights, rescission will be denied, and the complaining party left to his action at law for damages for the fraud. (*Id.*)
17. **SALE OF GOODWILL OF BUSINESS CONTRACT IN RESTRAINT OF TRADE—INHIBITION AS TO AGENCY—CONSTRUCTION OF CODE.**—An inhibition as to agency for others in a contract by one who has sold the goodwill of a business, engaging not to carry on a like business, or to act as agent in so doing, is within the provision of the code permitting a contract in restraint of trade to go to the carrying on of a similar business in such case; and the language of the code is to receive a reasonable construction, so as to effect the end for which the legislature

CONTRACT (Continued).

- says such contracts may be made, and to give reasonable protection to him in whose favor such a contract is executed, and the code provision as to the carrying on of a similar business is not to be limited to the carrying of it on as owner or proprietor, but is equally inclusive of the conduct of it, wholly or in part, as the agent of another. (Id.)
18. **CONSTRUCTION OF CONTRACT AND DECREE AS TO AGENCY—CONDUCT OF BUSINESS AS AGENT.**—An inhibition of agency in a contract not to establish, carry on, conduct, or maintain a rival business, or act as agent therefor, for a period of three years, and a decree enforcing such contract according to its terms, are to be construed as prohibiting only an agency wholly or partially for the conduct of the business, and not as prohibiting employment as a mere servant or clerk, though such employment may fall within the more enlarged meaning of agency as a general term. (Id.)
19. **INJUNCTION—FORM OF DECREE.**—A decree enjoining breach of such contract should not purport to enjoin the carrying on of the rival business for the space of three years from the date of the contract, "or so long as plaintiffs, or any one deriving title to the goodwill of the business, carry on said business," but it should read: "So long as plaintiffs, or any one deriving title to their business, shall carry on said business, not exceeding three years," from the date of the contract. (Id.)
20. **SUCCESSION TO GOODWILL OF BUSINESS—DENIAL IN ANSWER—DEMURRER—ADMISSION IN CROSS-COMPLAINT NOT A WAIVER.**—A denial in the answer of an averment in the complaint that plaintiffs had succeeded to the goodwill of the business sold by the defendant to his copartners, presents an issue material to plaintiffs' cause of action for breach of defendant's contract not to carry on a rival business, nor is the denial in the answer waived or overcome by an averment of that fact in defendant's cross-complaint; and it is error to sustain a demurrer to such answer. (Id.)

CORONER. See Contempt, 1.

CORPORATIONS. See Mines and Mining; Municipal Corporations; Mutual Benefit Society.

COSTS.

CONTINUANCE OF TRIAL.—The court has the right to impose costs, other than those properly taxable, as a condition for postponing the trial, and to proceed therewith upon the refusal of the party applying for the postponement to comply therewith. (*Pomeroy v. Bell*, 635.)

See Appeal, 4, 9; Estates of Deceased Persons, 1.

COUNTIES.

1. **POWER OF SUPERVISORS—EMPLOYMENT OF COUNSEL—ASSISTANCE OF DISTRICT ATTORNEY NOT ESSENTIAL—CONTEST OF SALARIES OF DEPUTIES.** The board of supervisors is made by law the guardian of the interests of the county, and, by subdivision 17 of section 25 of the County Government Act of 1893, is empowered to direct and control the prosecution and defense of all suits to which the county is a party, and may employ counsel for that purpose, whether in aid of the dis-

COUNTIES (Continued).

strict attorney or otherwise, and where in their opinion, the deputies of certain officers, including the district attorney, are drawing salaries without authority of law, they may properly employ other counsel, exclusive of the district attorney, to prosecute actions to enjoin the payment of such salaries. (*Lamberson v. Jeffers*, 363.)

2. **DISCRETION OF SUPERVISORS—POWER OF EMPLOYMENT NOT DEPENDENT UPON RESULT.**—Whether, in any particular case, the employment of counsel shall be made, is addressed to the discretion which the supervisors are to exercise in behalf of the public interests; nor is their right to employ counsel and to make the value of their services a charge upon the county dependent upon the result of the suit; but wherever there is room for an honest difference of opinion as to such result, and, in the opinion of the supervisors, the interests of the county require the employment of counsel, they are justified in making such employment. (*Id.*)
3. **ALLOWANCE AND SETTLEMENT OF EXPENSES AND SERVICES OF COUNSEL—ADJUDICATION CONCLUSIVE UPON AUDITOR—MANDAMUS—IMMATERIAL EVIDENCE.**—The allowance and settlement of a claim for the expenses and services of counsel employed by the supervisors is an adjudication by a tribunal having jurisdiction of the matter that the services have been rendered, and of the correctness of the claim, and is conclusive upon the auditor, who cannot refuse to draw his warrant upon the ground that the services were not rendered, or were of less value; and, upon mandamus to compel him to draw warrants upon claims so allowed, evidence is not admissible for him to show whether suits were brought by such counsel, or whether they had assisted the district attorney in bringing any suits, or whether he had sought for any assistance, and what had been the result of the suits brought by the plaintiff; but these questions are irrelevant and immaterial to the issue before the court. (*Id.*)

See Public Officers, 1-4, 9-12.

CRIMINAL LAW.

1. **SUSPENSION OF SENTENCE—DIRECTION FOR DEPORTATION.**—After a verdict convicting a defendant of a felony has been rendered, an order, made at his request, by its terms directing a suspension of judgment and allowing him to ship upon a United States deep water vessel, and requiring the sheriff to to make a due return thereof to the court, is in legal effect a mere order that sentence be suspended until further order of the court; and the court has jurisdiction, several years thereafter, to set aside such order, and sentence the defendant to imprisonment. (*People v. Patrich*, 332.)
2. **TRIAL—ORAL CHARGE—SHORTHAND NOTES—PRESUMPTION UPON APPEAL.**—Where the record upon appeal from a judgment of conviction in a criminal case shows that oral instructions were given to the jury, but fails to show that the oral charge was not taken down in shorthand by the phonographic reporter, the legal presumption is that it was so taken down, and the fact that no transcribed copy of the reporter's notes appears in the record does not overcome the

presumption, such copy being no part of the record unless indorsed by the judge; and it devolves upon the appellant to show by bill of exceptions that the oral charge was not in fact taken down by the reporter to overcome the presumption to the contrary. (*People v. Ludwig*, 328.)

3. **BILL OF EXCEPTIONS—CORRECTION OF MISTAKE—NOTICE—ORDER SETTING ASIDE SETTLEMENT—APPEAL.**—Under section 473 of the Code of Civil Procedure, notice is not required to be given of an application for the correction of a mistake in a record; nor is the presence of a defendant convicted of felony needed at the hearing of a motion to correct a mistake in the settled bill of exceptions, so as to make it show the record as it actually existed; and where the defendant was given two days' notice of such motion, and the court, after the taking of evidence which justified the correction of a mistake in the bill, set aside the order settling the bill, corrected the mistake, and resettled the bill as corrected, the order setting aside the settlement will not be reversed upon appeal for the want of five days' notice to the defendant of the hearing. (*People v. Southern*, 359.)
4. **ASSAULT WITH INTENT TO COMMIT RAPE—SUFFICIENCY OF EVIDENCE—CREDIBILITY OF WITNESSES—PROVINCE OF JURY.**—The evidence of the prosecutrix alone may be sufficient to support a verdict of guilty of an assault with intent to commit rape; and when her evidence is corroborated by the testimony of another witness, the verdict will not be disturbed, except under very exceptional circumstances, the credibility of the witnesses being essentially a matter for the jury to pass upon. (*People v. Gomez*, 326.)
5. **WILLING SUBMISSION OF GIRL UNDER AGE OF CONSENT—SIMPLE ASSAULT NOT INVOLVED—INSTRUCTION.**—Where the prosecutrix was a girl under the age of consent, and whatever occurred took place with her entire willingness, the offense of simple assault is not in the case, the element of force being wanting; and, upon a charge of an assault with intent to commit rape, it is proper for the court to instruct the jury that their verdict should be either guilty of the offense charged, or not guilty. (*Id.*)
6. **ASSAULT WITH INTENT TO MURDER—EVIDENCE—IDENTIFICATION OF DEFENDANT—CROSS-EXAMINATION—APPAREL.**—Upon a charge of assault with intent to commit murder, where the identification of the defendant by the prosecuting witness was a vital point in the case, it is permissible and important for the defendant to impair, so far as he can by legal evidence, the force of the identifying evidence, and it is legitimate cross-examination upon the question of identity to ask the witness concerning the apparel of his assailant, and upon answer made that the coat of defendant exhibited to him was like the coat worn, it is proper to show that upon the preliminary examination, and upon the former trial the same witness had identified the same garment with positiveness, and that evidence was afterward adduced upon the former trial to show that defendant had purchased it subsequent to the date of the alleged offense, and it is reversible error to refuse to permit such evidence. (*People v. Turner*, 324.)

CRIMINAL LAW (Continued).

7. **PISTOL NOT IDENTIFIED—STRIKING OUT EVIDENCE—INSTRUCTION TO DISREGARD—ERROR NOT REVERSIBLE.**—Where the prosecuting witness gave a general description of the size and appearance of the pistol with which he had threatened, and, over defendant's objection, it was shown that when arrested defendant had two loaded pistols, one of which was admitted in evidence, but there was no attempt of the prosecuting witness to identify it, and upon proof by the defendant that the pistols were purchased by him after the date of the assault, the court reconsidered its ruling and struck out all the evidence as to defendant's pistols, and instructed the jury to disregard it, although it would have been a wiser procedure for the court in the first instance not to receive the evidence until satisfied of its admissibility, yet, under the circumstances, it cannot be said that the injury from the admission of the evidence afterward stricken out was reversible error. (Id.)
8. **ASSAULT WITH INTENT TO KILL—PRIOR CONVICTION—DENIAL AND SUBSEQUENT CONFESSION—VERDICT—SENTENCE—RECITAL IN JUDGMENT—APPEAL.**—Where a defendant charged with an assault with intent to kill, and also with having suffered a prior conviction of another felony, when arraigned, pleaded not guilty of the offense charged, and denied the prior conviction, and the verdict passed only on the plea of not guilty, but the sentence was too great, unless based on the prior conviction, and the judgment recited that defendant subsequently, on a specified day, confessed the prior conviction, the truth of which recital was not controverted, the verity of the recital must be accepted; and where it appears that the case was conducted on the theory that the prior conviction had been confessed, and no reference was made to the prior conviction, either in the reading of the information or in the charge of the court, there is no defect in the judgment-roll of which defendant can take advantage upon appeal, and no error appears upon its face. (People v. McNeill, 388.)
9. **BURGLARY—EVIDENCE—STATEMENTS SHOWING INNOCENCE.**—On a trial for burglary, after evidence has been offered showing that, on the night of the burglary, the defendants were arrested with the property stolen in their possession, statements then made by them to the arresting officer, relating to their movements on the night in question, and to the goods in their possession, which if true, tended to show their innocence, are admissible without preliminary proof that such statements were freely and voluntarily made. (People v. Ashmead, 508.)
10. **BREACH OF PAROLE.**—Evidence is further admissible that on account of such statements the arresting officer then released the defendants upon their promise to return the next morning, the goods being left in his custody, but that they did not return then or at all, and that they were rearrested, after considerable search, several days later. (Id.)
11. **CHANGES IN INSTRUCTIONS ASKED.**—In such a case, changes made in instructions requested by the defendants that guilt must be proven "beyond all reasonable doubt," by inserting the word "a" in the place of "all," and that "possession of stolen property . . . is not sufficient to warrant a conviction," by inserting the word "mere"

- before the word "possession," are immaterial and without prejudice to the defendants. (Id.)
12. **FORGERY—UTTERING FALSE CHECK—PROOF OF OFFENSE—PERSONS BEARING FORGED NAME—CHECK NOT FICTITIOUS.**—Where the defendant was proved to have passed a false check upon a storekeeper as genuine, with intent to defraud, and it appeared that there were two persons in the county bearing the name which was falsely signed to the check, and that one of them resided in the city where the check purported to be made and was passed, and that neither of them authorized the defendant to sign his name to the check, the defendant was properly convicted of forgery, and it cannot be claimed that the check was fictitious. (*People v. Laird, Jr.*, 291.)
13. **EVIDENCE—EXISTENCE OF PERSONS WITH FORGED NAME—CITY DIRECTORY—GREAT REGISTER.**—It is competent to resort to the city directory and to the great register of the county to determine whether there was or was not a person in the city or county bearing the name which was signed to a false check passed by the defendant, and, if the name of such person is found therein, to show his residence. (Id.)
14. **HOMICIDE—SELF-DEFENSE—CONVICTION OF MANSLAUGHTER—CONFLICTING EVIDENCE—APPEAL.**—A verdict for manslaughter will not be disturbed upon appeal, when the evidence is conflicting as to whether the homicide was or was not committed in self-defense, and there is enough evidence for the prosecution to warrant the verdict, and no such disparity appears in the statement of the witnesses for the prosecution as to render their evidence inherently improbable or necessarily unworthy of belief. (*People v. Brittan*, 409.)
15. **INSTRUCTIONS—BURDEN OF PROOF—DEGREE OF PROOF REQUIRED—REASONABLE DOUBT.**—An instruction that "an unlawful killing must be proven by the state before the defendant can be convicted of any offense, whether murder or manslaughter," is not erroneous in not defining the degree of proof necessary to authorize conviction, and in leaving the jury to infer that a mere preponderance in the evidence would be sufficient, when it appears that the court elsewhere repeatedly stated the principle that guilt must be established beyond a reasonable doubt. (Id.)
16. **INSTRUCTIONS TO BE CONSTRUED TOGETHER—ISOLATED SENTENCE—OMISSION ELSEWHERE SUPPLIED.**—The entire charge of the court must be construed together, and error cannot be predicated upon an omission in an isolated sentence or phrase which is elsewhere supplied; and it is sufficient if the charge as a whole fairly covers all that is pertinent to the case, stated consistently and harmoniously. (Id.)
17. **DEFINITION OF REASONABLE DOUBT—EXCLUSION OF RATIONAL HYPOTHESIS—ABSENCE OF REQUEST.**—Where the ordinary definition of reasonable doubt is correctly given, the omission to tell the jury that the guilt of the defendant should be inconsistent with every other rational hypothesis is not erroneous, in the absence of a request that it be given. (Id.)
18. **RIGHT OF COURT TO STATE EVIDENCE.**—The court has a right to state the evidence for the purpose of pointing its instruction and making its pertinency apparent to the jury, if it assumes no fact as proven,

CRIMINAL LAW (Continued).

and states nothing by way of argument thereon, nor anything calculated expressly or by implication to indicate a shifting of the burden of proof to the defendant. (Id.)

19. **CHALLENGE OF JUROR—IMPROPER QUESTION.**—A defendant charged with murder has no right in impaneling a jury to ask a juror how many murder cases he had sat on as a juror, either for the purpose of showing actual bias, or for the purpose of determining whether to challenge peremptorily. (Id.)
20. **MISCONDUCT OF DISTRICT ATTORNEY—ABSENCE OF EXCEPTION.**—Where there was no objection made nor exception taken to alleged misconduct of the district attorney, it cannot be reviewed upon appeal. (Id.)
21. **HOMICIDE—INVOLUNTARY MANSLAUGHTER—INFORMAL VERDICT—USE OF WORDS "NOT A FELONY"—SURPLUSAGE—PROVINCE OF JURY.**—A verdict of guilty of involuntary manslaughter, found against defendants jointly indicted and tried for murder, is rendered informal by adding thereto the words "not a felony," and persisting in their use against an instruction of the court to reconsider the verdict and strike them out; but where the jury added the further words, "as charged and laid down by the court under the head of involuntary manslaughter," and it appeared that the court in its charge used the words "acts not amounting to felony" taken from the code definition of involuntary manslaughter, and the jury further recommended the defendants "to the extreme mercy of the court in its sentence and punishment," whatever may have been their intention in using the words "not a felony," their verdict cannot be construed as intended to acquit the defendants, but should have a reasonable construction to give effect to their manifest intention to convict them of involuntary manslaughter, and those words should be rejected as surplusage, it not being within the province of the jury to determine whether involuntary manslaughter was or was not a felony, which is determined by the statute. and the general verdict of "guilty of involuntary manslaughter," should stand as the verdict of the jury. (People v. Holmes, 444.)
22. **MOTION FOR NEW TRIAL—AFFIDAVIT OF JURORS—IMPEACHING VERDICT.** Upon the hearing of a motion for new trial, the affidavits of jurors cannot be received to impeach their verdict; and the court properly refused to consider an affidavit of eight of the jurors to the effect that their verdict of "guilty of involuntary manslaughter, not a felony," was intended to find the defendants guilty of a misdemeanor only, and that the jury would not have agreed to convict the defendants of any manslaughter which was a felony. (Id.)
23. **PRESENCE OF DEFENDANTS—MINUTES OF COURT—CLERICAL ERROR—BILL OF EXCEPTIONS—APPEAL—PRESUMPTIONS AGAINST ERROR.**—A clerical error in the minutes of the court in stating that "the jury, defendant and all counsel" were present at a time specified will be disregarded, where the bill of exceptions states that "defendants and respective counsel" were then present, nor can the defendants impeach the verity of the bill of exceptions, and if any of them were not present, that fact should have been made affirmatively to appear; nor is the silence of the record in failing to show that defendants were present when the

verdict was rendered ground for reversal, all intendments upon appeal being in favor of the regularity of the judgment, and error will not be presumed, but the absence of the defendants, or any of them, must be made to appear affirmatively in the record. (Id.)

24. **EVIDENCE TO SUSTAIN VERDICT.**—The evidence reviewed and held sufficient to warrant the jury in finding a verdict of guilt of involuntary manslaughter against the defendants. (Id.)
25. **DEATH FROM RUPTURE OF BLOOD VESSEL—HYPOTHESIS—SPONTANEOUS RUPTURE—UNLAWFUL ACTS OF DEFENDANTS—INSTRUCTIONS—PROVINCE OF JURY** It appearing that the immediate cause of the death of the deceased was the rupture of a blood vessel, and the medical testimony being such as to leave the question with the jury to decide whether the rupture was spontaneous, or was the result of the unlawful acts of the defendants, it was within the province of the jury either to adopt or reject the hypothesis of spontaneous rupture, notwithstanding instructions that if there was reasonable doubt of the cause of the death, or if they could account for it upon any other hypothesis than that of the guilt of the defendants, they must acquit the defendants; and where the jury found the origin of the rupture to be the treatment received by the deceased from the defendants, their verdict cannot be disturbed upon appeal. (Id.)
26. **CONSPIRACY OF MEMBERS OF TRADE UNION TO PREVENT WORK—USE OF VIOLENCE—JOINT LIABILITY OF CONSPIRATORS—INSTRUCTION.**—Where there was evidence sufficient to leave the question with the jury as to the nature and extent of a conspiracy of the members of a trade union, including the defendants, to prevent the deceased from working, and to assault him with violence for so doing, and tending to show that some of the defendants assaulted the deceased without provocation, and that all of the defendants aided, abetted and encouraged the assault, it is proper to instruct the jury that "a conspiracy exists when two or more persons conspire to commit an unlawful act, or to commit a lawful act by unlawful means," and that "no person has any right, by violence or unlawful means, to prevent another from exercising a lawful trade or calling, or doing any other lawful act," and that "if two or more persons conspire together to prevent another person by violence or unlawful means" from so doing, "and while engaged in carrying out such conspiracy they (the conspirators) commit a felony or some other unlawful act not amounting to a felony upon the body" of such person, "they are all liable for the acts of any one of their number done in pursuance of such conspiracy." (Id.)
27. **IMPORTANCE OF CONSPIRACY ELEMENT OF CRIME CHARGED.**—Defendants jointly indicted and tried for murder are not charged with the crime of conspiracy; and the conspiracy element of the crime charged becomes important only as a means of establishing the commission of the crime charged against the defendants jointly; but, in this view, evidence is properly submitted to show a conspiracy, and instructions are properly given defining it. (Id.)
28. **RESOLUTION OF STRIKING TRADE UNION—INTERVIEW OF NONUNION MEN—CONDUCT OF MEMBERS—CONSPIRACY—QUESTIONS FOR JURY.**—Although a resolution passed by the members of a trade union, who were engaged

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in a strike, in reference to interviewing nonunion men, may not import an intention to commit an unlawful act, or to do a lawful act by unlawful means, yet it is competent to inquire into the subsequent conduct of such members to ascertain whether or not there was a joint intention, not disclosed by the resolution, formed at the time of its passage or subsequently to do an unlawful act, or to do a lawful act by unlawful means; and the questions how far their conduct went to establish a conspiracy, and to what extent they were involved in it, and when it was formed, if at all, and when terminated, and whether the acts of violence proved were or were not part of an original design to force the deceased to quit work, and whether the crime alleged was committed in pursuance of the conspiracy, or was the independent act of some of the persons present, outside of and foreign to the common design, are questions exclusively for the jury. (Id.)

29. **ACTS OF DEFENDANTS AT TIME AND PLACE OF ASSAULT—TIME OF CONSPIRACY.**—The acts of the defendants at the time and place of the assault may be considered by the jury, as tending to show the purpose and objects of the conspiracy in its inception; nor is it necessary that the jury should locate the conspiracy at any time prior to the coming of the defendants to the building where the assault was made; but it might have originated then and there. (Id.)
30. **INSTRUCTION CITING DECISION IN ANOTHER STATE.**—The method of stating a rule in a charge to the jury as having been held in a cited decision of the highest court of another state is not to be commended, but it cannot be prejudicial where there is no error in the rule as stated, when considered as part of the whole instruction. (Id.)
31. **INSTRUCTION AS TO MURDER AND MANSLAUGHTER—CONSEQUENCES OF UNLAWFUL ACTS—VAGUE EXPRESSION NOT MISLEADING.**—Where the jury has been correctly instructed by the court as to the distinction between murder and manslaughter, growing out of unlawful acts, a conclusion stating that "it follows, therefore, that if an act is unlawful, or is not as duty does not demand, and of a tendency directly dangerous to life, the destruction of life by it, however unintended, will be murder; but if the act, though dangerous, is not directly so, yet sufficient to come under the condemnation of the law, and death results from it, the homicide is manslaughter," taken as part of the whole instruction does not enlarge the correct doctrine by making a person liable for all possible consequences; and though the expression "or is not as duty does not demand," is vague and uncertain, it could not have misled the jury. (Id.)
32. **INSTRUCTION AS TO INVOLUNTARY MANSLAUGHTER—APPLICABILITY TO CONDUCT OF DEFENDANTS—QUESTION FOR JURY.**—When the charge of the court fully and correctly defined manslaughter, an extract therefrom to the effect that involuntary manslaughter was "killing in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection," is not objectionable as inapplicable to the conduct of the defendants, where their conduct was such as to make it a question for the jury whether any or all of the defendants did or did not do anything in connection with a request to the deceased to quit work, in an

- unlawful manner, or without due caution or circumspection, or whether force was used justifiably, or under such circumstances as to make the defendants aiders and abettors in an assault upon the deceased. (Id.)
33. **CROSS-EXAMINATION OF DEFENDANT.**—A defendant offering himself as a witness may be cross-examined as to occurrences testified to in his examination in chief, where the cross-examination does not go beyond the limitations prescribed in section 1323 of the Penal Code, as construed by the decisions of this court. (Id.)
34. **HOMICIDE—SELF-DEFENSE—DISPUTED CLAIM TO LAND—EVIDENCE—INTERVIEW BETWEEN CLAIMANTS—PEACEFUL INTENTION OF DECEASED—UNARMED CONDITION—HARMLESS RULING.**—Upon the trial of a defendant accused of murder, who claimed that the homicide was in necessary self-defense, where it appeared that there was a disputed claim to land between the defendant and two other men, who went to the house of defendant to see about defendant's claim to the land, and in the interview both men lost their lives, it is proper for the prosecution, in opening its case, to introduce evidence tending to show that the intentions of the deceased persons were peaceful, and that they were unarmed when they started to the interview; and even if such evidence were not admissible then, the judgment could not be reversed merely because evidence was received at the wrong time, in the absence of a showing of special injury therefrom. (People v. Yokum, 437.)
35. **DYING DECLARATIONS—PROOF OF SENSE OF IMPENDING DEATH.**—It is not essential to the admissibility of a dying declaration that the person making it should have stated expressly that he was making a dying statement, or that it was made under a sense of impending death; but it is enough if that fact be made to appear in any lawful mode. (Id.)
36. **MATTER FOR DYING STATEMENT—FOLLOWING OF DECEASED BY DEFENDANT—REQUEST NOT TO SHOOT AGAIN.**—It is proper subject matter for a dying statement to declare that after the fatal shot defendant followed the deceased up a hill, and the deceased begged him not to shoot him any more, and that he was dying then. (Id.)
37. **DISPUTE AS TO CHARACTER OF LAND—IMMATERIAL EVIDENCE.**—Where the land in dispute was claimed as mining ground by the deceased claimants, and as agricultural land by the defendant, the merits of the controversy between them are immaterial, and it is proper to refuse to permit the defendant to show that the land had been adjudged to be agricultural by the secretary of the interior. (Id.)
38. **EXPERT EVIDENCE—COURSE OF BULLET—REMARK OF JUDGE.**—Where there had been a *post mortem* examination of the body of the deceased by two physicians, who disagreed as to the direction of the bullet when it entered the body, and as to the cause of its deflection, the issue between them being material to the inquiry as to whether the shot was fired in the position testified to by the defendant, or in that stated in the dying declaration of the deceased, upon the offer of other medical expert testimony on behalf of the defendant as to the cause of the deflection, to corroborate the claim made for the defendant as to the

course of the bullet, though the inquiry was material, a remark of the judge that it seemed to him the evidence was immaterial, made without intent to influence the jury, and in connection with a reasonable limitation of the number of additional expert witnesses, and with the further correct remark that the material inquiry was to show the direction of the bullet when it entered the body, could not have had the effect to influence the jury prejudicially. (Id.)

39. **COMPETENCY OF PHYSICIAN AS EXPERT—GUNSHOT WOUNDS—DEFLECTION OF BULLET.**—A physician, as such, without a showing that he has had experience with gunshot wounds, is not an expert upon that subject; and as matter of common knowledge, no one can say as an expert that a bullet cannot be deflected in the human body without striking a bone. (Id.)
40. **LETTER AS EVIDENCE—PROVINCE OF JURY—PROOF OF MEANING NOT ADMISSIBLE.**—The value of a letter as evidence is to be determined by the jury, to whom the facts concerning it may be shown, but the application of the facts to the letter is to be made by the jury; and where there is no technical language requiring interpretation, it is proper for the court to refuse to permit a witness to tell the meaning of the letter. (Id.)
41. **MISCONDUCT OF DISTRICT ATTORNEY—IMPROPER STATEMENTS CHARGING MALICE—CONVICTION OF MANSLAUGHTER—IRREGULARITY NOT PREJUDICIAL.** Misconduct of the district attorney, in making improper statements tending to show malice on the part of a defendant accused of murder, though strongly to be condemned, is not a prejudicial irregularity, where the jury found that there was no malice by finding a verdict of manslaughter, as the jury could not have been influenced by such misconduct unfavorably to the defendant and may have been influenced the other way. (Id.)
42. **INSTRUCTIONS—SELF-DEFENSE—DUTY TO DESIST FROM VIOLENCE TO DISABLED ASSAILANT—DOCTRINE OF APPEARANCES—CONSTRUCTION OF CHARGE.** An instruction to the effect that while a person may repel force by force in defense of person, habitation, or property against one or many who manifestly intend or endeavor, by violence or surprise, to commit a known felony on either, yet when the person assailed has rendered his assailant or assailants harmless, and incapable of doing any further injury, and is no longer in danger, he must desist from further acts of violence, and if he continues the force, and kills him or them, it is murder and not self-defense, is not subject to the objection that it omits the doctrine of appearances, where, in the preceding and following instructions the jury were repeatedly told that the danger which would justify the homicide might be real or apparent, and that the jury were not to consider whether the defendant was in actual peril, but only whether the indications were such as to induce defendant, as a reasonable man, to believe that he was in peril or danger, and that if he so believed reasonably, and fired at deceased under such belief, though it should appear that he was not armed, they should acquit the defendant; and such instructions as to apparent danger are not to be deemed inconsistent with the instruction that defendant must desist from further violence to a disabled assailant,

but are to be considered as explanatory of it, and as applying to the conflict in all of its stages. (Id.)

43. **HOMICIDE—EVIDENCE—PREVIOUS TROUBLE—TENDENCY TO DISGRACE DEFENDANT.**—Upon the trial of a defendant charged with murder, the prosecution is entitled to show any previous difficulties or troubles that had arisen between the defendant and the deceased, in order to indicate the state of mind of the defendant at the time of the killing. This showing is not limited to physical encounters, but may consist solely in an affray of words; and this character of evidence is admissible, however much it may tend to disgrace and injure the defendant in the estimation of the jury. (People v. Colvin, 349.)
44. **GENERAL STATEMENT OF NATURE OF TROUBLE—MATTER OF DETAIL—MOTION TO STRIKE OUT—IMPROPER OBJECTION.**—A witness may be properly asked to make a general statement of the nature of any preceding trouble between the defendant and the deceased; but the location of the right or wrong of the trouble is immaterial, and the evidence should not be introduced in detail; yet, if the answer of the witness includes any objectionable matter of detail, the wrong can only be remedied by a motion to strike it out, and, if no such motion is made, the evidence cannot properly be objected to on the ground that it tends to disgrace and injure the defendant in the estimation of the jury. (Id.)
45. **INVOLUNTARY MANSLAUGHTER — INDICTMENT — VARIANCE.**—The crime of involuntary manslaughter is included in an indictment for murder, and where the indictment charged that the defendant did "deliberately, willfully, and unlawfully, kill one Ellen Dogan," the crime of manslaughter of both kinds is included in the charge of unlawful killing, and a conviction for involuntary manslaughter does not constitute a variance. (People v. Pearne, 154.)
46. **NEGLIGENT ACT CAUSING DEATH—RECKLESS DRIVING—COUNTY ORDINANCE IMMATERIAL.**—Where it is claimed that the defendant, while intoxicated, drove his team of horses through the principal street of a town in a reckless manner, and at a great and unusual rate of speed, thereby causing the death of a feeble old woman, who was crossing the street, the charge of involuntary manslaughter should rest upon the commission of an act which might produce death, done without due caution and circumspection; and evidence of the violation of a county ordinance does not strengthen the case, and is better omitted. (Id.)
47. **"UNLAWFUL ACT"—MALUM PROHIBITUM—INDEFINITE ORDINANCE—QUESTIONS SUGGESTED, BUT UNDECIDED.**—It is suggested, but not decided, that an act which is merely *malum prohibitum*, in the violation of a municipal or county ordinance, is not an "unlawful act," within the provision of section 192 of the Penal Code defining manslaughter; and also that a county ordinance making it a misdemeanor to drive at a greater rate of speed than six miles an hour within any unincorporated town or village containing five hundred inhabitants, without specifying or giving any boundaries of unincorporated villages and towns, or means whereby their populations may be de-

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terminated, may be void by reason of uncertainty and indefiniteness. (Id.)

48. **CONTRADICTORY INSTRUCTIONS—NEW TRIAL.**—Where the instructions are unsatisfactory and contradictory, and do not clearly and fairly present to the jury the law bearing upon the facts of the case, and seem both to exclude and to include consideration by the jury of the violation of a county ordinance, a new trial must be granted. (Id.)
49. **EVIDENCE—SOBRIETY OF DEFENDANT.**—The exclusion of evidence of the sobriety of the defendant at the time of the accident is not erroneous, the question of sobriety being immaterial, if the deceased was run over and killed by the defendant "without due caution and circumspection." (Id.)
50. **HOMICIDE—SELF-DEFENSE—INTENTION TO KILL—ERRONEOUS INSTRUCTION.**—Upon the trial of a defendant accused of murder, where the testimony for the defendant tended to show that the killing was done in self-defense, an instruction as to the presumption of intention to kill from the fact of shooting at and killing the deceased, which concludes with the statement that "unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless," is erroneous as to such conclusion, as the defendant might have intended to kill, and yet have been guiltless. (People v. Newcomer, 263.)
51. **INSTRUCTION AS TO REASONABLE DOUBT—USE OF WORD "DEMONSTRATE."** An instruction that "it is sufficient if he [the defendant] demonstrate to your understanding by testimony given, by inferences correctly and properly drawn from the whole testimony in the case, that notwithstanding the burden so cast upon him, there still exists in your mind a reasonable doubt of his guilt," though unhappily expressed in the use of the word "demonstrate," is not for that reason ground for reversal, as, taken in connection with the context, the jury could not have understood the instruction as requiring anything more than the raising of a reasonable doubt. (Id.)
52. **WAYS AND METHODS OF WEIGHING TESTIMONY—PROVINCE OF JURY—IMPROPER INSTRUCTION—ERROR WITHOUT INJURY.**—The jury alone has power to weigh the testimony of witnesses and to determine the facts, and it is not proper for the court to instruct them as to ways and methods by which they shall exercise their powers; but, where the instruction merely tells the jury to do certain things which jurors would evidently do without being told, the error is without injury, and not ground of reversal. (Id.)
53. **INSTRUCTION AS TO SELF-DEFENSE—DUTY OF AGGRESSOR TO DECLINE FURTHER STRUGGLE—LANGUAGE OF CODE—IMMATERIAL DEPARTURE.**—In giving an instruction as to the conditions under which the right of self-defense may be asserted, it is better to use the words of section 197 of the Penal Code, when the court is endeavoring to state the principle announced in the statute; but where the court has used the statutory words in another part of the charge, in regard to the duty of an aggressor to "have endeavored to decline any further struggle," the statement that he must have "in good faith withdrawn from the contest before any fatal blow was given," is

not such a material departure as to mislead the jury, and will not justify a reversal of the judgment. (Id.)

54. **DEFENDANT AS FIRST ASSAILANT—CREATING NECESSITY FOR SELF-DEFENSE—INAPT FORM OF INSTRUCTION.**—An instruction to the effect that a necessity for self-defense cannot be created where the cause of the homicide originates in the fault of the party committing it, unless he in good faith first declines further struggle, would be better founded upon a clear statement of the hypothesis that the defendant was the first assailant; but where an instruction assumes that the cause of the homicide "originates in the fault of the party himself, in a quarrel which he has provoked and brought on, in a danger which he has voluntarily brought upon himself by his own misconduct and lawlessness," and concludes that he cannot, "upon killing the person with whom he seeks the difficulty, interpose the plea of self-defense; unless, if he was the aggressor, that he had really and in good faith endeavored to decline any further struggle before the mortal blow was given," it cannot be assumed, considering the latter part of the instruction, that the jury would understand from the first part of it, that, if the defendant had merely used disagreeable and provoking words, he could not defend himself against an attack of the deceased brought on by such words; and though the instruction, taken as a whole, is in a form not approved of, its inaptness of form is not alone sufficient to warrant a reversal of the judgment. (Id.)
55. **REASONABLE DOUBT AS TO DEGREE OF CRIME—FORM OF INSTRUCTION AS TO VERDICT—ACQUITTAL OF "HIGHER" OFFENSE.**—An instruction as to what verdict should be rendered, where there is a reasonable doubt as to the degree of the crime, would better be given in the statutory language of section 1097 of the Penal Code, which provides that "when it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only"; but where an instruction, in a case of homicide, states that the jury "may, if the evidence warrants it, find the defendant guilty of murder in the first degree, or murder in the second degree, or of manslaughter," and that "should the jury entertain a reasonable doubt as to which of the grades of crime named the defendant may be guilty of, if any, they will give the defendant the benefit of the doubt, and acquit him of the higher offense," the instruction is not misleading, and does not tell the jury merely to acquit of the highest of the three offenses named, and it is not to be presumed that the jury understood the word "higher" in any other than its grammatical sense as denoting one of two things. (Id.)
56. **BURDEN OF PROOF—REASONABLE DOUBT—REFUSAL OF INSTRUCTION.**—Where there is nothing in the evidence for the prosecution to take the case out of the rule declared in section 1105 of the Penal Code, that "the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only

amounts to manslaughter, or that the defendant was justifiable or excusable," and where the court has properly instructed the jury upon the subject of the burden of proof, and that it is sufficient if the defendant raises a reasonable doubt of his justification, it is proper to refuse an instruction asked by the defendant to the effect that the burden of proving circumstances that justify the killing of the deceased by the defendant does not rest upon the defendant. (Id.)

57. **SUDDEN ATTACK UPON PERSON WITHOUT FAULT—RIGHT TO STAND GROUND—NO DUTY TO FLEE—IMPROPER MODIFICATION OF INSTRUCTIONS—CASE CRITICISED.**—The duty of the defendant to flee rather than to kill, if retreat is possible, only applies where the defendant is the assailant; but when a defendant who is himself without fault is suddenly attacked in a way that puts his life or bodily safety at imminent hazard, he is not compelled to fly or to consider the proposition of flying, but may stand his ground and defend himself to the extent of taking the life of the assailant, if that be reasonably necessary; and an instruction requested embodying the right of a person who is without fault to stand his ground against an assailant, and to slay him under appearances justifying it, "even if it be proved that he might more easily have gained his safety by flight," should be given as asked, and it is error to modify it so as to instruct the jury that "if he could have withdrawn from the danger, it was his duty to retreat," and that "between his duty to flee and his right to kill he must fly." (Id.)
58. **ATTACK IN ONE'S OWN HOUSE—SELF-DEFENSE—FLIGHT NOT REQUIRED—PREJUDICIALLY ERRONEOUS MODIFICATION OF INSTRUCTION.**—When a man without fault is suddenly attacked in his own house, in a murderous or dangerous manner, he is not called upon to flee from his home, nor to consider the proposition of so fleeing; and where the defendant testified that he was assaulted by the deceased with a pistol, when he was in his own home, and that in order to protect his own life he was compelled to shoot, and did shoot, the deceased first, an instruction properly based upon that evidence should be given as requested by the defendant; and a modification of the instruction, so as to ignore the defendant's evidence, and to treat him as an aggressor whose duty it was to flee rather than to kill, if retreat were possible, is inapplicable, and prejudicially erroneous. (Id.)
59. **PERJURY—AUTHORITY TO ADMINISTER OATH ESSENTIAL.**—In order to constitute the offence of perjury, it is essential that the violated oath shall appear to have been administered by competent authority, and it is not sufficient that the officer may have had general power to administer oaths, but it must appear that he possessed authority to administer the oath in the particular proceeding involved; and however false the oath may be, the person making it cannot be convicted of perjury, unless the officer who administered the oath had legal authority to administer it. (People v. Cohen, 74.)
60. **PRELIMINARY EXAMINATION BEFORE SUPERIOR JUDGE AS MAGISTRATE—CLERK NOT AUTHORIZED TO ADMINISTER OATH.**—Upon a preliminary ex-

amination before a superior judge sitting as a magistrate, the magistrate alone is authorized to administer oaths; and the clerk of the superior court has no authority, by virtue of his position, to administer an oath in such a proceeding, and if he administers such oath without special direction of the judge sitting as a magistrate, the person taking the oath before the clerk cannot be convicted of perjury. (Id.)

61. **AUTHORITY OF SUPERIOR JUDGE SITTING AS MAGISTRATE.**—A superior judge, when sitting as a magistrate, possesses no other or greater powers than are possessed by any other officer exercising the functions of a magistrate, and has no greater authority as such magistrate than that possessed by any justice of the peace, or police judge, and is not accompanied in the discharge of those functions by any general or implied powers, nor by any of those presumptions of regularity which surround him when sitting as a judge of a court of record; and he has no more authority to call in the county clerk or other officer to administer oaths before him than a justice of the peace or police judge would possess. (Id.)
62. **AUTHORITY STATUTORY—DELEGATION OF POWER—IMPLICATION AS TO OATH BEFORE MAGISTRATE.**—The authority of a judge sitting as a magistrate is purely that given by the statute; and while there is no express provision of the statute requiring the witnesses before a magistrate to be sworn by him personally, neither is there any such giving him power to delegate that duty to another; and, the power being statutory, the implication would be that it was intended that the oath should be administered by the magistrate. (Id.)
63. **DIRECTION TO ADMINISTER OATH—PLEADING—INSUFFICIENT INDICTMENT.** Assuming that the magistrate may competently direct a clerk or other officer to administer oaths in his presence for him, it must be specifically alleged in the indictment or information that the oath was administered at the direction of the magistrate; and an averment that "a duly appointed, qualified, and acting deputy county clerk of the city and county of San Francisco, an officer authorized by law to administer oaths, and to administer an oath to said Louis Cohen," etc., administered the same, is but the averment of a legal conclusion that, being a deputy clerk, the officer was so authorized, and is not an averment that he was so authorized or directed by the magistrate; and the indictment is insufficient to show that any valid oath was administered to the defendant. (Id.)
64. **CONSTRUCTION OF CODE—OATH ADMINISTERED IRREGULARLY.**—Section 121 of the Penal Code, which provides that "it is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner," has reference to some mere informality in the substance of the oath as administered before the officer having authority to administer it, and does not excuse the necessity of an oath in substantial form administered by a person of competent authority. (Id.)
65. **PERJURY—FALSE OATH IN INSOLVENCY.**—Under section 124 of the Penal Code, the crime of perjury, in making a false oath to a petition and schedules in insolvency, is completed when, at the in-

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stance of the defendant, the papers are filed in court; and an information therefor should allege the falsity of the oath as of that time. (People v. Maxwell, 50.)

66. **INSUFFICIENT EVIDENCE OF OFFENSE.**—Under section 1963 of the Code of Civil Procedure, requiring as indispensable evidence to a conviction of perjury the testimony of two witnesses, or of one witness and corroborating circumstances, an insolvent debtor, accused of perjury in falsely swearing to a schedule of assets which omitted a particular promissory note, cannot be convicted upon mere evidence of his ownership of the note some months prior to the filing of his petition in insolvency, of his subsequent possession thereof, and of his admission to sundry persons that he had money or resources with which to pay his debts. (Id.)
67. **ROBBERY—PLEAS—FORMER ACQUITTAL—JEOPARDY—PRIOR DEFECTIVE INFORMATION—OWNERSHIP OF PROPERTY—DISMISSAL—INSTRUCTION.** Where an information charging defendant with the crime of robbery omitted to state the ownership of the property taken from the person robbed, such omission rendered the information fatally defective and invalid, and where it was dismissed on that ground, upon motion of the district attorney, after the jury was sworn, and before any evidence was offered, there was no jeopardy or acquittal of the defendant; and where a plea of former acquittal and of once in jeopardy was interposed to a new information for the same offense, because of the dismissal of the prior information, the court may properly instruct the jury to find for the people upon such pleas. (People v. Ammerman, 23.)
68. **DEFINITION OF ROBBERY—OWNERSHIP OF PROPERTY IN ANOTHER ESSENTIAL—CONSTRUCTION OF STATUTE—LEGISLATIVE INTENT—INFORMATION FOLLOWING WORDS OF STATUTE.**—Although the statute defines robbery to be the felonious taking of personal property in the possession of another, and does not expressly provide, as in larceny, that it must be the personal property of another, yet the ownership of the property in some person other than the accused must be regarded as within the legislative intent denouncing the crime of robbery, and is deemed to be as essential in making out the crime as any other element of the offense expressed in the statute; and an information for robbery omitting to aver such ownership cannot be regarded as within the rule that an information is good because substantially following the language of the statute. (Id.)
69. **ASSAULT WITH INTENT TO COMMIT ROBBERY—OWNERSHIP OF PROPERTY.** The ownership of the property in another person than the defendant is as requisite to the crime of assault with intent to commit robbery as it is to the crime of robbery. (Id.)
70. **FILING NEW INFORMATION WITHOUT ORDER OF COURT—CONSTRUCTION OF PENAL CODE.**—It is not mandatory upon the court, under section 1117 of the Penal Code, to direct the district attorney to file a new information, where the jury is discharged because the facts as charged do not constitute an offense; and the district attorney may file a new information, in such case, without an order of the court; nor is the

- prosecution barred, in such case, under section 1008 of the Penal Code, because the court did not direct a new information to be filed, that section being only applicable in the case of a demurrer sustained. (Id.)
71. INSTRUCTIONS TO FIND FOR PEOPLE UPON PLEAS—QUESTION OF LAW—PROVINCE OF JURY.—Where the facts relied upon to support a plea of former acquittal and of once in jeopardy are the dismissal, after the impaneling of the jury, of a fatally defective information, on motion of the district attorney, by reason of its omission to allege the essential fact of ownership of the property, such omission being patent and not disputed, a question of law is raised as to its effect, of which the jury is not competent to judge; and an instruction, in such case, that the jury should find for the people upon the plea does not invade the province of the jury. (Id.)
72. MODIFICATION OF INSTRUCTIONS—REASONABLE DOUBT—ARGUMENT OF COUNSEL.—An instruction upon the subject of reasonable doubt is properly modified by striking out a clause giving to the defendant the benefit of any doubt created by the argument of counsel. (Id.)
73. BURDEN OF PROOF—MISLEADING CLAUSES.—An instruction as to the burden of proof is properly modified by striking out clauses calculated rather to confuse the minds of the jury than to aid them in solution of the evidence. (Id.)
74. BELIEF OF JURORS AS MEN.—It is proper to strike out a clause of an instruction stating that the jurors "may believe as men that certain facts exist," but that, as jurors, they must act only upon evidence introduced. (Id.)
75. ADMISSIONS—STATEMENTS OF DEFENDANT NOT INVOLVING CONFESSION—EXAMINATION BY DISTRICT ATTORNEY—PRELIMINARY PROOF.—Where the defendant made no confession, consisting of a declaration of his agency or participation in the crime charged, or acknowledgment of guilt, but, upon a private examination by the district attorney, after his arrest, and before his preliminary examination, stated that he had a quarrel with the person upon whom the robbery was committed, on the day of its commission, and that he had some money on the following day, which he denied having stolen, but stated that he found it in a sock after leaving that person, such statements of the defendant may be given in evidence without the preliminary proof of their voluntary character required in case of their confession. (Id.)
76. TESTIMONY OF SHORTHAND REPORTER—USE OF NOTES TO REFRESH MEMORY.—A shorthand reporter who took down the statements of the defendant to the district attorney, in shorthand, may be permitted to read his transcription of the statements made, and has a right to refer to the notes to refresh his memory. (Id.)
77. TRIAL—TIME FOR PREPARATION—REFUSAL OF REQUEST—ABSENCE OF EXCEPTION—TRIAL WITHOUT OBJECTION—APPEAL—PRESUMPTION.—Where seventeen days' time was allowed to a defendant under indictment, in which to prepare for trial, and no exception was taken to an order refusing his request for thirty days' time for prepara-

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tion, and defendant went to trial without objection that he was then unprepared for trial, or applying for a further continuance, it must be conclusively presumed upon appeal that he was then ready for trial; and where nothing appears in the record to show that he was prejudiced by the refusal of a longer time, no error is shown under the circumstances, and no violation appears of defendant's right to a reasonable opportunity to prepare for his trial. (*People v. Winthrop*, 85.)

78. **DENIAL OF CHALLENGES FOR CAUSE—NONEXHAUSTION OF PEREMPTORY CHALLENGES.**—The denial of defendant's challenges for cause will not be considered upon appeal, where it appears from the record that, when the jury was completed, the defendant had remaining more peremptory challenges unexhausted than there were denials of his challenges for cause. (*Id.*)
79. **ACQUIESCENCE OF DEFENDANT—ESTOPPEL.**—A defendant should not be heard to complain of error, the injurious effects of which he has suffered, if at all, only by reason of his acquiescence in or failure to avoid it, when he had the means and opportunity to do so. (*Id.*)
80. **ROBBERY—ENTICING VICTIM TO SUITABLE PLACE—EVIDENCE—DECLARATIONS OF DEFENDANT—PROPOSAL TO KIDNAP AND ROB.**—Where the victim of the robbery charged against the defendant was a stranger in the city, to whom the defendant introduced himself under a false name, and who was enticed by the defendant to an isolated cottage, under the false representation that he was taking him to make a friendly call at defendant's home, in which cottage he was violently assaulted by defendant and a confederate, bound hand and foot, and robbed, and kept bound and confined under threats of torture and death, to induce him to authorize the payment of twenty thousand dollars to the defendant, evidence is admissible to show all of the declarations made by the defendant to the person robbed, and also to show that defendant had proposed to another witness that they should go in together, and "kidnap" the man, and force him by torture to make a check, or give up money, and had said that a house could be rented for that purpose, and that he thought fifty thousand dollars could be realized, and that he had told the witness on the day of the robbery that he had introduced himself to the man, and that he had the house rented, and his plans all formed, and was then waiting for him according to appointment; and such evidence, being admissible to connect defendant with the offense laid, and to identify him as a guilty participant therein, it is immaterial whether it had or had not a tendency to show an intent to commit another offense. (*Id.*)
81. **EXHIBITS FROM SCENE OF ROBBERY.**—Exhibits of articles taken from the house where the robbery was committed, and identified by the person robbed, and shown to have been used by defendant in connection with the offense, are admissible as a part of the transaction, and as tending to corroborate the witness as to the circumstances of the crime. (*Id.*)
82. **CIRCUMSTANCES OF ARREST—CONCEALMENT—DISGUISE—DECLARATIONS—ARTICLES TAKEN FROM DEFENDANT.**—Evidence is admissible to show that

at the time of the arrest the defendant was apparently hiding in disguise and passing under an assumed name, and denied his identity to the arresting officer, and that among the articles found on his person were several newspaper clippings containing accounts of the robbery, and a recently purchased railroad ticket from Oakland to Mojave. (Id.)

83. **LARCENY—ABSENCE OF INSTRUCTIONS.**—An objection that the court erred in failing to instruct the jury that the offense of larceny was included in the charge against the defendant is not tenable, when no such instruction was requested, and where such instruction would not have been pertinent to any evidence in the case. (Id.)
84. **INSTRUCTION AS TO PRESUMPTION OF INNOCENCE.**—An instruction to the jury that the presumption of innocence accompanies the defendant throughout the trial, and goes with the jury in their retirement to consider their verdict, and will avail to acquit the defendant unless overcome by sufficient proof of guilt, that they must examine the evidence by the light of that presumption, and that unless, upon examining it, they find it sufficiently strong to overcome and remove the presumption and to satisfy them of the defendant's guilt beyond a reasonable doubt, he is entitled to an acquittal, correctly states the law. (Id.)
85. **PREPARATION OF AFFIDAVITS FOR NEW TRIAL—MISCONDUCT OF JURY—NEWLY DISCOVERED EVIDENCE—INADEQUATE SHOWING FOR FURTHER TIME.** There is no adequate showing of necessity for further time for the defendant to prepare affidavits on motion for new trial to establish misconduct of the jury and newly discovered evidence, where the showing does not indicate what the misconduct of the jury consisted in, or the name of any juror guilty of misconduct, nor state the nature of the newly discovered evidence desired, nor that there was any reasonable expectation that it could be obtained, nor why it could not have been produced at the trial. (Id.)
86. **PUNISHMENT FOR ROBBERY—IMPRISONMENT FOR LIFE—CONSTRUCTION OF PENAL CODE.**—The provision of section 213 of the Penal Code, that robbery is punishable by imprisonment in the state prison "not less than one year," does not establish the intent of the legislature that the punishment must be limited to a definite term of years; but such intent is expressly negatived by section 671 of the Penal Code, which expressly authorizes imprisonment for life in cases where no limit to the duration of the imprisonment is declared; and a sentence of imprisonment for life for robbery, is not in excess of the power of the court. (Id.)
87. **TRIAL—CONTINUANCE—ABSENCE OF WITNESSES—INSUFFICIENT SHOWING—DISCRETION.**—Affidavits for a continuance of a criminal cause, for the absence of material witnesses for the defendant, which merely show an unsuccessful search for the witnesses, and do not name the whereabouts of any of them, except one who was stated upon information and belief to be somewhere in Mexico, and do not show that the attendance of any one of them would or could be procured within any reasonable time, are not sufficient to establish an abuse of the discretion of the court in denying the motion. (People v. Wade, 672.)

CRIMINAL LAW (Continued).

88. **SEDUCTION UNDER PROMISE OF MARRIAGE—CORROBORATION OF PROSECUTRIX—CONSTRUCTION OF CODE.**—The evidence of the prosecutrix, whether corroborated or not, if believed by the jury and the judge who presided at the trial, is sufficient to justify a verdict of guilty of the crime of seducing and having sexual intercourse with an unmarried female of previous chaste character, under promise of marriage, under section 208 of the Penal Code; and section 1108 of the same code, which provides that upon a trial for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of twenty-five years, for the purpose of prostitution, the defendant cannot be convicted upon the testimony of the woman upon whom or with whom the offense was committed, unless she is corroborated by other evidence, has no application to offenses committed in violation of section 208. (Id.)
89. **EVIDENCE—PROOF OF CHASTE CHARACTER—LIMITATION AS TO TIME.**—The proof of the chaste character of the prosecutrix is properly limited to the time prior to the alleged seduction, and there is no error in striking out a question and answer designed to prove that she never had sexual intercourse with any other man than the defendant. (Id.)
90. **TESTIMONY OF ACQUAINTANCE OF PROSECUTRIX.**—A witness of whose family the prosecutrix had been a member, and who had had occasion to be well acquainted with her, may be properly asked what, from his acquaintance with her and his observations of her general conduct, he would say as to whether or not she was a chaste and virtuous girl prior to the time of the alleged seduction. (Id.)
91. **IMPEACHMENT OF WITNESS—CONTRADICTORY STATEMENTS—NECESSITY OF LAYING FOUNDATION.**—A witness cannot be impeached by proof of statements inconsistent with his testimony, unless the foundation is first laid therefor, by relating the statements to him, with the circumstances of times, places, and persons present, and asking him whether he made such statements, and, if so, allowing him to explain them. (Id.)

See Evidence, 12.

DAMAGES. See Common Carriers; Factor, 4; Libel; Negligence, 7, 14, 15.

DEED.

1. **PARTITION—PROOF OF TITLE—SHERIFF'S DEED TO COMMON GRANTOR—SUFFICIENCY OF DESCRIPTION—REVIEW UPON APPEAL.**—In an action of partition, where all of the parties who set up any title base their rights under conveyances from a common grantor, the sufficiency of the description, or validity of a sheriff's deed to such common grantor, need not be determined upon appeal, as, if such common grantor had no title, appellants have no interest in the premises involved, and are not concerned in the judgment. (*Davis v. Pacific Improvement Co.*, 45.)
2. **PROOF OF DELIVERY OF DEED—AUTHENTICATED COPY OF RECORD.**—In the absence of contrary proof, an authenticated copy of the record of a deed is sufficient proof to establish the fact of its delivery. (Id.)

8. EXCLUSION OF SECOND DEED FROM COMMON GRANTOR—HARMLESS RULING

Where a first deed from a common grantor of appellants and respondents was received in evidence in support of the title of respondents, and a second deed from the same grantor, which was subsequently executed, and which, if admitted, would be worthless, and could not change the aspects of the case, there being no evidence to show the invalidity of the first deed, was excluded from evidence as being incompetent, irrelevant, and immaterial, and for the reason that it appeared that the grantor had no title at its date, he having before that parted with his title under the first deed, such exclusion is not prejudicial or reversible error. (Id.)

See Taxation, 1-5.

DIVORCE.

1. **MAINTENANCE OF CHILDREN BY MOTHER—DIVISION OF PROPERTY—STIPULATED DECREE—REFUSAL TO MODIFY.**—Where, by stipulation of the parties to an action for divorce, the community property was divided so as to yield property to the wife, free of encumbrance, of the value of ten thousand dollars, she having also other property of her own valued at three thousand one hundred dollars, while the husband retained only about sufficient property to pay his debts, and, by their agreement, the decree awarded the custody of the minor children to the mother, to be maintained and educated at her sole cost, and that she should have no other alimony or allowance from the father, the stipulated disposition of the property was an equitable settlement, as between the parties, of the burden of caring for and maintaining the offspring; and where it appears that the children are properly supported, maintained, and educated by the mother, and that she has nine thousand dollars in value left of the property awarded to her, her application to modify the decree so as to cast the burden of maintaining the children upon the father is without merit, and is properly refused. (Parkhurst v. Parkhurst, 18.)
2. **APPLICATION TO MODIFY DECREE—EVIDENCE—STIPULATION FOR SUPPORT OF CHILDREN.**—Although the stipulation of the parties to an action for divorce cannot divest the parents, as against the children, of the duty of maintaining them, and is not admissible to vary or modify a decree of divorce, or to change the rights of the parties as determined thereby, yet where the stipulation supports and upholds the decree, and is tantamount to an agreed statement of facts, upon which that portion of the decree relating to property rights and the custody, maintenance, and education of the children was based, the stipulation is admissible in evidence against the mother, upon her application to modify the decree, so as to require the father to maintain the children contrary to the stipulation. (Id.)
3. **COUNSEL FEE.**—Where an application of the divorced mother to modify the decree is without merit, her application for a counsel fee is properly denied. (Id.)

EJECTMENT.

EVIDENCE OF PLAINTIFF'S TITLE—FORECLOSURE OF MORTGAGE—LOSS OF JUDGMENT-ROLL—JUDGMENT-BOOK—RECITALS IN JUDGMENT.—IT

EJECTMENT (Continued).

an action of ejectment, when the plaintiff claims title under the foreclosure of a mortgage against the defendant, and a sheriff's deed under the order of sale of the mortgaged premises, and it appears that the judgment-roll in the action of foreclosure was lost, the judgment-book is competent evidence of what matters were passed upon and determined by the court, and the recitals in the judgment showing acquisition of jurisdiction over the defendants are at least prima facie evidence of the truth of the facts recited, and of the validity of the judgment, and the judgment-book should be admitted as part of plaintiff's proofs, together with the sheriff's certificate of sale, and the deed founded upon it. (*Simmons v. Threshour*, 100.)

See *Landlord and Tenant*, 2; *Statute of Limitations*.

ELECTIONS.

ACT OF MARCH 13, 1897.—The act of March 13, 1897, providing for general primary elections, does not apply to municipal elections to be held in the year 1897, for the reason that by its terms the machinery provided for the holding of such primary elections is not to be set in operation until January, 1898, when under section 5 the election commissioners are to select the names of those electors who are to act as officers of the primary election boards. (*McKinnon v. Leonard*, 302.)

See *Municipal Corporations*, 4, 5; *Public Officers*, 5-8.

EMINENT DOMAIN.

1. **CONDEMNING LAND FOR PRIVATE WAY—ACTION BY COUNTY—INSUFFICIENT COMPLAINT.**—A complaint in an action by a county to condemn the land of the defendant for a private way, which merely avers the filing of a sufficient petition and the giving and approval of the bond, and that afterward such proceedings were had that, on a day specified, the board of supervisors of the county, by order duly given and made, directed the district attorney to institute condemnation proceedings, but which fails to state that viewers were appointed, or that they proceeded to lay out the road, or that they made or filed any report, or that the report was approved, or that damages awarded had been tendered to defendant and refused by him, fails to state a cause of action. (*County of Sonoma v. Crozier*, 680.)
2. **JURISDICTION OF BOARD—COMPLIANCE WITH STATUTE ESSENTIAL—EFFECT OF ORDER DIRECTING SUIT—CONSTRUCTION OF CODE.**—A complaint in condemnation proceedings must show that the board had jurisdiction to make the order for the institution of condemnation proceedings; and unless the board complies with the requirements of the statute its orders are void; and section 2690 of the Political Code, which makes the order for the institution of the suit conclusive as to the regularity thereof, must be understood as providing that when the board has jurisdiction mere irregularities are harmless, and not as providing that the board can make a valid order opening a road over private property without a substantial compliance with the requirements of the code. (*Id.*)

See *Constitutional Law*

1. **PROCEEDING TO REVOKE PROBATE—NONRESIDENT CONTESTANT—SECURITY FOR COSTS.**—A contest to revoke the probate of a will is a special proceeding, and not an action within the meaning of section 1036 of the Code of Civil Procedure, requiring nonresident plaintiffs to give security for costs. In such proceeding, a nonresident contestant is not required to give such security. (Estate of Joseph, 600.)
2. **SEPARATE ESTATE OF DECEASED WIFE—ORDER SETTING APART TO MINOR CHILDREN—CONSTRUCTION OF CODE.**—Section 1469 of the Code of Civil Procedure, providing that an estate in value not exceeding fifteen hundred dollars shall be set apart for the use of the minor children, if there be no widow, applies to the separate estate of a deceased wife, and covers all property where the estate does not exceed in value that sum, whether the property be community or separate. (Estate of Leslie, 72.)
3. **DECREE OF DISTRIBUTION—DISOBEDIENCE OF EXECUTRIX—CONTEMPT PROCEEDINGS—APPEAL—DISMISSAL.**—Obedience by an executor or administrator to a decree of distribution may be enforced by contempt, proceedings, and no appeal will lie from the order adjudging the contempt; and where an executrix contumaciously disobeyed a decree ordering a sum of money to be distributed and paid to the assignee of a legatee, and was adjudged guilty of contempt therefor and ordered committed to jail until she complied with the terms of the decree, an appeal taken by her from the order adjudging her in contempt must be dismissed. (Estate of Wittmeier, 255.)
4. **APPEALS IN PROBATE PROCEEDINGS—ORDERS AFTER JUDGMENT—CONSTRUCTION OF CODE.**—Appeals in probate proceedings lie only from such orders and decrees as are enumerated in section 903, subdivision 3, of the Code of Civil Procedure; and the provisions of subdivision 2 of that section, relative to appeals from orders made after judgment, are not applicable to probate proceedings. (Id.)
5. **ORDER REFUSING LETTERS OF ADMINISTRATION—IMPLIED FINDING—INSUFFICIENT BILL OF EXCEPTIONS—APPEAL—EVIDENCE NOT REVIEWABLE.**—Where an order refusing letters of administration of the estate of a deceased person is in general terms, it implies a finding against the petitioner upon all the material allegations of the petition; and if there is no specification of insufficiency of the evidence to justify the decision, the appellate court is precluded from looking into the evidence to ascertain its sufficiency to sustain the order. (Estate of Depeaux, 200.)
6. **APPEAL—ORDER SETTLING FINAL ACCOUNTS AND DISTRIBUTING ESTATE—UNDERTAKING—STIPULATION—DISMISSAL.**—An appeal from an order settling the final account of an executor, and distributing the estate, cannot be dismissed on the ground that there are two appeals, and that the undertaking is not sufficient for both appeals, where there is a stipulation in the transcript that "an undertaking in due form was properly made and filed," etc., and counsel cannot be relieved from such stipulation after the expiration of the time within which another bond might have been filed, upon a showing that the undertaking in fact referred to only one of the appeals, without determining which. (Estate of Marshall, 379.)
7. **SETTLEMENT OF FINAL ACCOUNT—ITEMS ALLOWED IN PREVIOUS SETTLEMENTS.**—Items in a final account which had been allowed in previous ac-

ESTATES OF DECEASED PERSONS (Continued).

counts, which were settled after due and sufficient notice of the filing thereof, and of the time and place of hearing, are conclusive, and cannot be re-examined upon settlement of the final account. (Id.)

8. **COMMISSIONS OF EXECUTORS—ALLEGED AGREEMENT FOR LESS COMPENSATION—FINDING OF COURT.**—An allowance of full commissions to the executors in the final account will not be disturbed upon appeal, because of an alleged agreement for less compensation, where there is not sufficient evidence in the record to overthrow the finding of the court against the fact of such agreement. (Id.)
9. **RENTS OF PROPERTY DEVISED JOINTLY—DISTRIBUTION.**—Where a dwelling-house and lot were devised jointly to the husband of the decedent, and to their three daughters, subject to the right of the husband to occupy the furnished house for life, and to the right of any widowed or homeless daughter to occupy the same jointly with the husband, one-third of the value of the furniture being the property of the husband, and the remaining two-thirds thereof having been bequeathed by the decedent to the three daughters, in making distribution of rents of the furnished house received by the husband, who was one of the executors, the rental value of the house and lot is to be ascertained separately, and the proportion of rent received therefrom is properly distributed to the husband and three daughters, share and share alike, and the rental value of the furniture, after deducting the husband's third thereof, is properly distributed to the three daughters, share and share alike. (Id.)
10. **ALLOWANCE TO ATTORNEY FOR EXECUTORS.**—The allowance of one hundred dollars as a fee for the attorneys of the executors for legal services rendered about the matters of the estate, after the allowance and approval of the second annual account of an estate of the total value of over forty-eight thousand dollars, is not unreasonable. (Id.)
11. **CERTIFICATE OF INDEBTEDNESS OF INSOLVENT BANK—CHARGE OF AMOUNT RECEIVED—STATEMENT BY EXECUTORS.**—Where the proportionate share which the estate received upon a certificate of indebtedness of an insolvent bank was less than its face amount, the executors should not be charged with the full amount of the face of the certificate, but only with the real amount received, although the executors first stated the amount of the certificate as cash. (Id.)
12. **CARE OF VINEYARD—ACCOUNTING.**—Expenses necessarily incurred by an executor in preserving a vineyard forming part of the testator's estate, and preventing the vines from being destroyed, are proper charges against the estate, for which he should be given credit in his accounting. And the presumption is that in making them the executor acted in good faith, in the absence of proof that he knew he could have caused the vineyard to be preserved at less expense. (Estate of Smith, 462.)
13. **LIABILITY OF EXECUTOR—SPECULATIVE VENTURE.**—The rule as to an executor's liability for the unlawful employment of the funds of the estate is not that he is to be charged for all money invested in the speculation, and also with all that is received from it, but only that he must make good the loss resulting from the business, or if a profit has been earned that he must account for it to the estate. (Id.)
14. **CREDIT FOR PROPER EXPENDITURES.**—Upon an accounting by an executor he should be given credit for expenses of administration properly

ESTATES OF DECEASED PERSONS (Continued).

made by him; and the court cannot properly reserve the question of the propriety of such disbursements for a future occasion, and charge the executor with the amount so expended as being money in hand, and direct him to apply the same to the payment of a family allowance. (Id.)

15. **CONSENT OF COURT.**—The failure of an executor to obtain the consent of the court to the expenditure of the money of the estate to a particular purpose does not render such expenditure improper. (Id.)
16. **DEATH OF SOLE EXECUTRIX — LETTERS WITH WILL ANNEXED — RIGHTS OF PUBLIC ADMINISTRATOR AGAINST SISTER OF EXECUTRIX — DISCRETION — WAIVER OF COMMISSIONS.**—Where a widow was appointed sole executrix of the will of her deceased husband, but died several years after his death, without having applied for letters, the public administrator is entitled to letters of administration upon the estate of the deceased husband with the will annexed, as against the sister of the deceased executrix, who was executrix of her will; and the court has no discretion to refuse such letters to the public administrator, and to grant them to the sister of the deceased executrix, notwithstanding her offer to waive commissions, in the interest of the estate. (Estate of McDonald, 277.)
17. **CONSTRUCTION OF CODE—DEFAULT IN LETTERS TESTAMENTARY—DEATH OF EXECUTOR BEFORE PROBATE OF WILL—GRANT OF LETTERS AS IN CASES OF INTESACY.**—Under section 1350 of the Code of Civil Procedure, which provides that "if the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued as designated and provided for the grant of letters in cases of intestacy," it is the manifest intention of the legislature to make the provisions of section 1365 of the same code, regulating the grant of letters in cases of intestacy, applicable in any case provided for in section 1350, including cases where the executor dies before the will has been probated or letters have been issued. (Id.)

See Husband and Wife; Landlord and Tenant, 3, 4; Pleading, 2; Will.

ESTOPPEL. See Appeal, 12; Factor, 6; Streets, Roads, and Highways.

EVIDENCE.

1. **IMPEACHMENT OF WITNESS—INCONSISTENT STATEMENTS.**—To impeach a witness upon the ground of inconsistent statements, the impeaching testimony must be plainly inconsistent with that already given. (Estate of O'Connor, 69.)
2. **CONTEST OF WILL—TIME OF STROKE OF APOPLEXY—STATEMENT OF ANSWER NOT INCONSISTENT WITH EVIDENCE.**—Where the executor, upon the contest of a will, testified upon cross-examination that the deceased was not suffering from a stroke of apoplexy at the time when the will was made, a statement in his original answer to the contest that the deceased was attacked by a stroke of apoplexy at about the hour of 10 A. M. on the day on which the will was executed, is not

EVIDENCE (Continued).

admissible for the purpose of impeachment, it not appearing whether the will was executed before or after the stroke of apoplexy, or that the statement of the answer related to the time when the will was made, so as to be plainly inconsistent with the evidence given. (Id.)

3. **USE OF ORIGINAL ANSWER FOR IMPEACHMENT—EFFECT OF AMENDED ANSWER.**—The fact that the original answer is superseded by an amended answer as a pleading furnishes no valid ground for rejecting proof of its statements for purposes of impeachment, when they are plainly contradictory of evidence given by the party who verified the original answer. (Id.)
4. **EXCLUSION OF PHYSICIAN'S CERTIFICATE AS TO CAUSE OF DEATH—APPEAL—EVIDENCE NOT IN RECORD—INJURY NOT SHOWN.**—If the certificate of the attending physician showing that the death of the deceased was caused by apoplexy is to be regarded as competent evidence of that fact in favor of the contestant of the will of the deceased, under section 1920 of the Code of Civil Procedure, yet, where the evidence given upon the trial of the contest is not embodied in the record upon an appeal taken by the contestant, and it does not appear that the will was not made prior to the stroke of apoplexy, the appellant does not fulfill his duty of showing that substantial injury resulted from the ruling of the court, and does not show that the offered evidence was at all material. (Id.)
5. **AGENT FOR PLAINTIFF AS WITNESS FOR DEFENDANT—IMPEACHMENT BY DEFENDANT—INSUFFICIENT OBJECTION.**—Where an agent for the plaintiffs had testified fully for the plaintiffs, and was afterward called as a witness for the defendant, the defendant is not entitled, upon an unfavorable answer from the witness, to impeach his general reputation for truth, honesty, and integrity, if objection thereto were properly raised; but objection to such impeaching evidence is not properly raised by a mere general objection that the evidence is "incompetent, irrelevant, and immaterial," it being competent in a general sense, and only incompetent because of the fact that defendant had made the impeached witness his own, which must be specified in order that the point of the exception may be apparent to the court. (*Wise v. Wakefield*, 107.)
6. **IMPEACHMENT NOT CONFINED TO PLACE OF RESIDENCE—INSUFFICIENT OBJECTION.**—The objection that the impeaching evidence was not confined to the place of residence of the witness must be specifically stated, and is not properly raised by a general objection that the evidence is incompetent and irrelevant. (Id.)
7. **QUESTION AS TO BELIEF OF WITNESS UNDER OATH—RULE UNCHANGED BY CODE.**—A witness who has testified to the general reputation of another witness as to truth, honesty, and integrity may be asked whether, on such reputation, he would believe him under oath; and the rule in this respect established in *Stevens v. Irwin*, 12 Cal. 306, has not been changed by the enactment of section 2051 of the Code of Civil Procedure. (Id.)
8. **OFFER OF EVIDENCE—ORAL OFFER—DISCRETION.**—The court has discretion to permit a formal offer of evidence to be made orally; and it

EVIDENCE—Continued.

is not an abuse of discretion to overrule an objection that the offer should be in writing. (Id.)

9. **PROOF OF MOTIVE OF ACTION IMMATERIAL—ERROR WITHOUT PREJUDICE—ADMISSION OF DEBT.**—Upon the issue as to whether defendant owed plaintiffs the balance of account alleged by them, proof as to the motives of plaintiffs in bringing the action is immaterial; and it is not admissible for defendant to prove that the action was not brought in good faith, but to get defendant's place of business by attaching his stock in trade; but if such evidence is received without objection, a subsequent answer to a question as to what induced the defendant to think the action was maliciously brought, to which objection was made, taken in connection with evidence admitting that defendant owed plaintiffs something, and had refused to pay them before suit was brought, is error without prejudice. (Id.)
10. **ADMISSIONS—EXPLANATORY EVIDENCE—PLEADINGS.**—The general rule that an entire admission is to be taken together, in order to enable the court or jury to judge of its true extent, does not extend to receiving the whole of what was said by the party making the admission, but only such other or further part of what was said as would in any way explain or qualify the part first given in evidence; and this is the true rule applicable to admissions in pleadings under our codes. (Granite Gold Mining Company v. Maginness, 131.)
11. **ADMISSION OF ANSWER—EJECTMENT FOR MINING CLAIM—TITLE OF CORPORATION PLAINTIFF—EXPLANATORY EVIDENCE—AVERMENT OF DEFENDANT'S TITLE—NONSUIT.**—In an action of ejectment brought by a mining corporation to recover a mining claim, where the plaintiff offered in evidence, in support of its title, an averment of the answer that, at a time specified, title to the mining ground in controversy was vested in a person named, and that, under a contract and certain mesne conveyances, the legal title thus vested passed to and vested in the plaintiff, only so much of the answer as is explanatory of such admission or may qualify it, is proper evidence for defendants, and not the entire answer, and where defendants read the whole remainder of the answer, which averred a legal and equitable title in the defendants at the beginning of the action, such averment is not binding upon the plaintiff, and the defendants are not entitled to a nonsuit upon the ground that plaintiff offered no evidence in rebuttal of the alleged title of the defendants. (Id.)
12. **CRIMINAL LAW—RAPE—DATE OF BIRTH OF FEMALE CHILD—TESTIMONY OF MOTHER—ENTRY IN BIBLE NOT ADMISSIBLE—HEARSAY.**—Upon the trial of a defendant accused of rape in having had sexual intercourse with a female child under the age of fourteen years, where the mother of the girl is in court, and has testified to her age, an entry made by the mother in a Bible of the date of the girl's birth is not admissible as substantive evidence of that fact; such testimony is, in its nature, hearsay evidence, and subject to the general rule by which that class of evidence is governed, viz., that the fact sought to be established cannot be otherwise shown, and is incompetent to establish any fact which is susceptible of being proved by witnesses who speak from their own knowledge. (People v. Mayne, 516.)

EVIDENCE—Continued.

13. **PEDIGREE NOT INVOLVED.**—Although the age of the female child was involved in the issue to be tried, that fact did not constitute it a case of pedigree in which her age could be proved by the written declaration of a third person. (Id.)
14. **EVIDENCE IN CASE OF PEDIGREE.**—In cases of pedigree it must be shown that the person who made the entry is dead before the evidence will be admissible. (Id.)
15. **ALTERATION IN ENTRY—PROVINCE OF COURT—DISCRETION—APPEAL.**—Whether there has been a material alteration in an entry made in a family Bible is a question to be determined by the court when it is offered, and before it is presented to the jury; and, where such entry is admitted, it must be assumed upon appeal that the court was satisfied that no material change had been made in the entry, in the absence of any showing to the contrary, and, its action being matter of discretion, its ruling upon the question of alteration is not open to review, unless it is made to appear that its discretion was abused. (Id.)

See Agency; Common Carrier, 6; Consideration, 4; Contract, 8, 9; 10; Counties, 3; Criminal Law, 4, 6, 9, 10, 12-14, 18, 24, 33-40, 43, 44-49, 58, 66, 75, 76, 80-82, 89-91; Deed, 2; Divorce, 2; Ejectment; Estates of Deceased Persons, 5; Factor, 5, 6; Insolvency, 3; Libel, 2, 3; New Trial, 1, 3, 4.

EXECUTION. See Appeal, 4; Judgment, 1; Receiver, 2; Water Front, 10.

EXECUTORS AND ADMINISTRATORS. See Estates of Deceased Persons.

EXPRESS COMPANIES. See Common Carriers.

FACTOR.

1. **SALE OF GOODS BY FACTOR—GUARANTY OF FIXED PRICE—BREACH OF INSTRUCTIONS—MEASURE OF DAMAGES.**—In case of a guarantee by a factor that the goods of the principal consigned to him for sale shall yield not less than a fixed price, the breach of his promise renders him liable as a guarantor for the amount which he has promised, irrespective of the value of the goods, or of the price at which he sold them, and the rule that where the factor has been instructed by his principal not to sell the consigned goods below a fixed price, and they are sold below that price, in violation of his instructions, the measure of damages is merely the actual damage or loss sustained by the principal, consisting not of the difference between the selling price and the price fixed by the principal, but of the difference between that price and the actual value of the goods, has no application to a recovery for breach of the contract of guaranty. (Pugh v. Porter Brothers Company, 628.)
2. **LIABILITY OF FACTOR AS GUARANTOR.**—The liability of the factor as a guarantor that the goods shall be sold for not less than a fixed price, becomes absolute upon a sale for cash, or, if upon credit, upon the expiration of the term of credit. (Id.)

3. **NEGLECTENCE OF FACTOR—FAILURE TO OBTAIN BEST MARKET PRICE FOR RAISINS—EVIDENCE—MARKET VALUE AT PLACE OF SALE.**—Upon the trial of a cause of action based upon the alleged negligence of a factor in failing to obtain the best market price for raisins consigned to him for the purpose of being shipped and sold in Chicago, the market price in Chicago is the basis of the defendant's liability, and their market value at the place of shipment is immaterial, and should not be admitted in proof, where the market value in Chicago can be directly shown, and it is prejudicial error to refuse to permit evidence to be received of what was the market price of raisins in Chicago at the time of sale. (Id.)
4. **ORDER NOT TO SELL WITHOUT INSTRUCTIONS—CONVERSION—MEASURE OF DAMAGES.**—Where a lot of raisins was to be shipped from Fresno to Chicago and held there by the factor until orders were received from the principal to sell them, a sale by the factor without receiving such orders is a conversion of them, for which their value in Chicago constitutes the measure of damages. (Id.)
5. **AVERAGE PRICE OF RAISINS—SHIPMENT AT DIFFERENT DATES—EVIDENCE OF VALUE.**—The average price of an average crop of raisins for the entire season is not admissible as evidence of the value of raisins shipped for sale in Chicago at different dates; and no evidence of any average price of the raisins could affect or vary the liability of the factor as a guarantor of a fixed price; nor could any evidence be received, to measure the liability of the factor for negligence, of any price of raisins antedating their receipt by the factor; but the proper course, in case of shipment of raisins at different dates, is to show the value in the Chicago market of each lot of raisins shipped within a reasonable time after their receipt by the factor to allow of their arrival and sale in Chicago. (Id.)
6. **ESTOPPEL—PLEADING—EVIDENCE—RENDITION OF ACCOUNTS—RECEIPT OF PROCEEDS—NEGLECTENCE.**—Where no estoppel was pleaded by the defendant, nor any issue of fact of that character submitted to the jury, mere evidence concerning the receipt by the plaintiff and his assignors of the accounts rendered to them by the defendant, and of their receipt of the proceeds of sales as shown by the account cannot be said, as matter of law, to estop them from recovering any damages sustained by reason of the defendant's negligence. (Id.)

FEES. See Municipal Corporations, 2.

FENCE.

1. **NUISANCE—OBSTRUCTION TO LIGHT AND AIR—INJUNCTION.**—A fence, erected wholly upon the land of the defendant, is not a division fence within the meaning of the act of March 9, 1885, limiting the height of division fences and partition walls in cities and towns, and an adjoining proprietor cannot enjoin it as a nuisance merely because it obstructs the passage of light and air to his building. (Ingwersen v. Barry, 342.)
2. **ANCIENT LIGHTS.**—The English doctrine of "ancient lights" does not obtain in this country; and the legislature cannot vest in an adjoining proprietor the right to prevent his neighbor from building upon

FENCE—Continued.

his own land such structure as he may see fit, provided it is not a nuisance. (Id.)

FINDINGS.

1. **WARRANTY—CONTRACT—WANT OF CONSIDERATION.**—In an action to recover for the breach of a written warranty of the capacity of a pump manufactured and sold by the defendant to the plaintiff, in which the defendant, by answer, denies making the representations alleged, sets out the representations that were made, and that the alleged warranty was without consideration and given after the purchase and delivery of the pump, and as a counterclaim, the amount of certain expenditures made by him in sending an agent to examine the pump, under an alleged agreement with plaintiff that, if the pump was found to be as represented by defendant, plaintiff would repay the expense of such agent, and by cross-complaint set up a want of consideration for the warranty and prayed for its reformation on account of accident and mistake, a finding that the defendant had fully complied with the terms of the contract, is sufficient to support a judgment in his favor, without finding specifically on the probative facts as to what representations and warranties were made, and rendered the subject matter of the cross-complaint immaterial. (Spaulding v. Dow, 424.)
2. **IMMATERIAL ISSUES.**—A finding that the warranty was without consideration rendered immaterial the issues raised by the cross-complaint as to its being made by accident or mistake. (Id.)
3. **COUNTERCLAIM.**—A finding, in general, that the allegations of the counterclaim "are untrue, and not supported by the evidence," should not be construed as intended to contradict the specific findings upon the main subject of the controversy. (Id.)

See Appeal, 7; Contract, 1-5, 12; Mechanic's Lien, 2; Mortgage, 1; Partition, 6, 7.

FORFEITURE. See Consideration, 1-3, 6.

FORGERY. See Criminal Law, 12.

FRAUD. See Contract, 13, 15, 16; Insolvency, 8.

GIFT.

PROMISSORY NOTE OF DONOR.—The gift of the donor's own promissory note, either *inter vivos* or in view of death, does not create an enforceable obligation in favor of the donee against the donor or his estate. (Tracy v. Alvord, 654.)

GOOD WILL. See Contract, 17-20.

GUARANTY. See Contract, 1; Factor, 1, 2, 5.

GUARDIAN AND WARD.

INVESTMENT BY GUARDIAN WITHOUT AUTHORITY OF COURT—LOANS UPON INADEQUATE SECURITY—REJECTION OF LOANS AS ASSETS.—A guardian, by securing the consent of the court, may invest the ward's estate without risk to himself; but where he fails to do so, and assumes

to act upon his own responsibility, he is held to a strict accountability; and where loans are made without the advice and consent of the court upon inadequate security, and were not such as a prudent business man would have made, the court may properly reject such loans as assets of the estate. (Guardianship of Carver, 73.)

HARBOR COMMISSIONERS.

1. **BOARD OF STATE HARBOR COMMISSIONERS—CONTROL OF POSITION OF VESSELS—DISCRETION TO CHANGE PLACE OF LANDING—NONINTERFERENCE OF COURT.**
The board of state harbor commissioners has power, and has a large discretion vested in it by law, to station, berth, and regulate the position of vessels in the docks and harbor in the bay of San Francisco, and to cause them to remove from time to time, and from place to place, as the general convenience, safety, and good order may require, and if its discretion is honestly exercised to change the place of landing of a vessel, a court of equity cannot interfere with its exercise or substitute the judgment of the court for that of the board, notwithstanding the conclusion of the board may appear erroneous, and the result may work hardship to the owner of the vessel. (Union Transportation Co. v. Bassett, 604.)
2. **REMOVAL OF STEAMBOAT STATION—INSUFFICIENCY OF WHARF ROOM—FRAUD—INJURY TO BUSINESS—AID OF RIVAL LINE—INJUNCTION—EQUITY JURISDICTION.**—Although a court of equity has jurisdiction to enjoin the action of the board of state harbor commissioners in the removal of the place of landing of a vessel, where its action is shown to be characterized by fraud, corruption, improper motives, or influences, plain disregard of duty, or violation of law, yet, in the absence of such showing, where it appears that, in the judgment of the board, the removal of the place of landing of a river steamboat was necessary to relieve the congested condition of traffic, and that the steamboat was the last vessel placed at the landing from which it was removed, the fact that the removal will produce great and irreparable injury to the business of the steamboat, and will aid a rival line by leaving it in the possession of the field, will not give jurisdiction to a court of equity to enjoin or interfere with the exercise of the discretion of the board to order such removal. (Id.)
3. **FRAUD—BURDEN OF PROOF—SUSPICION NOT SUFFICIENT—PRESUMPTIONS.**—Before a court of equity will interfere with the action of the board on the ground of fraud, the plaintiff must clearly establish the fact of fraud, and the proof must amount to more than mere suspicion, which cannot overcome the presumption which is always in favor of the good faith and fair dealing of public officers; and it will be presumed, in the absence of clear proof to the contrary, that the congested condition of the traffic could not have been relieved by other changes of vessels without equally harsh results. (Id.)
4. **INADMISSIBLE EVIDENCE—FRAUDULENT REPRESENTATION OF THIRD PERSON—BRIEBERY.**—Evidence is not admissible to show that a third person represented to plaintiff that for a specified sum of money he could obtain from the harbor commissioners a rescission of the order of removal, and that the money would be used in "fixing certain parties," in order to prevent the removal, where it was not shown that such third

HARBOR COMMISSIONERS (Continued).

person was in any way connected with the board of state harbor commissioners, nor that any of the board authorized or knew of the proposal. (Id.)

HOMESTEAD.

COMMUNITY PROPERTY—SURVIVORSHIP—CHILDLESS WIDOWER—EXTENT OF EXEMPTION—PRE-EXISTING DEBTS.—Where a homestead declared by a husband upon community property vested in him as survivor upon the death of his wife, notwithstanding the fact that he was left a childless widower, and ceased to be the head of a family, the extent of the homestead exemption of five thousand dollars continues in his favor as to all pre-existing debts contracted before the death of the wife, and during the existence of the homestead. (Robinson v. Dougherty, 299.)

HUSBAND AND WIFE.

1. **AGREEMENT FOR SEPARATION—RELEASE OF RIGHT OF SUCCESSION.**—An agreement for separation between a husband and wife, made in pursuance of a compromise of an action for a divorce, providing for a division of property between them, and containing a mutual release "from all obligations for the future acts and debts of each other," and an individual release each to the other from the then existing debts and obligations of each, but not containing a release, in terms, by either one, of claims upon the future acquisitions of the other, nor, in terms, any release by either one upon the estate of the other in case of death, does not amount to a waiver or release by either of the right to succeed to all or any portion of the other's estate. (Estate of Jones, 499.)
2. **ESTATE OF DECEASED PERSON—APPEARANCE OF ATTORNEY.**—In a proceeding for a distribution of such a wife's estate, instituted by the husband, and on the appeal from the decree therein, the public administrator, as administrator of her estate, who made and had no claim upon the estate beyond his commissions, was not an adverse party, nor a necessary party to the appeal, and the attorney who appeared for him in the general proceedings of the administration had a right to appear as attorney for the husband in the proceeding for a distribution. (Id.)

See Divorce.

INJUNCTION.

MANDATORY INJUNCTION—REMOVAL OF TRADE SIGNS PENDENTE LITE.—The granting of a mandatory injunction pending the trial of an action, and before the rights of the parties in the subject matter which the injunction is designed to effect have been definitively ascertained, is not permitted except in extreme cases where the right thereto is clearly established, and it appears that irreparable injury will flow from the refusal; and in an action to enjoin the use of a trade name a mandatory injunction to compel the removal of trade signs by the defendants *pendente lite* is erroneous, where the ultimate rights of the parties cannot

INJUNCTION (Continued).

be determined in advance of the trial of the action. (*Hagen v. Beth*, 330.)

See Contract, 13, 19; Fence, 1; Water Front, 16; Water and Water Rights, 1.

INSOLVENCY.

1. **DEBT DISCHARGED IN INSOLVENCY—NEW PROMISE—CONSIDERATION.**—When a debt has been discharged by proceedings in insolvency, the remedy to enforce the payment of the debt is gone, but the moral obligation to pay it still remains and is a good consideration for a new promise to make such payment. (*Lambert v. Schmalz*, 33.)
2. **ACTION UPON NEW PROMISE—PROOF REQUIRED.**—When an action is brought to recover a debt discharged in insolvency, it must be based upon the new promise, and, to support the action, it must appear that the promise was clear, distinct, unconditional, and unequivocal. (*Id.*)
3. **EVIDENCE OF NEW PROMISE—STATEMENTS PRIOR TO DISCHARGE.**—Where there was evidence of repeated promises to pay the debt made after the discharge in insolvency, and a number of payments were made upon it by the defendant thereafter, statements made by the defendant, prior to the discharge, that he would pay plaintiff every dollar of the money, though not constituting such a promise as would remove the bar of the discharge, may properly be considered as supporting the evidence of promises subsequently made. (*Id.*)
4. **NOTE FOR MONEY LOANED—ORAL PROMISE—INTEREST.**—Where the debt discharged was a note given for money loaned, bearing interest at the rate of two per cent per month, a clear and unconditional oral promise to pay the debt may be the subject of an action, but, in such case, the indebtedness only bears legal interest from the date of the promise. (*Id.*)
5. **PERCENTAGE.**—No percentage can be recovered by the plaintiff in such action. (*Id.*)
6. **OPERATION OF INSOLVENT LAWS—CONTRACT WITH CITIZENS OF OTHER STATES.**—The insolvent laws of one state have no extraterritorial operation, and cannot discharge contracts with citizens of other states, unless the citizen of another state voluntarily becomes a party to the insolvency proceeding. (*Scamman v. Bonslett*, 93.)
7. **CONTRACT MADE BETWEEN CITIZENS OF CALIFORNIA—REMOVAL OF CREDITOR TO ANOTHER STATE—ACTION IN THIS STATE—VALIDITY OF DISCHARGE.** Although, as a general rule, a citizen of another state, who has not become a party to insolvency proceedings in this state, is not bound by such proceedings, or by the discharge therein; yet, where it appears that the debtor and creditor were both citizens of California at the date of the contract, and that the contract was made and is payable in this state, it seems that, in an action brought in this state by the creditor to enforce such contract, a certificate of discharge of the debtor under the insolvent law of this state enacted before the indebtedness accrued, is a valid defense to the action, even though the creditor had become a resident of another state after the making of the contract. (*Id.*)

INSOLVENCY (Continued).

- 8. INVOLUNTARY INSOLVENCY—TRANSFER OF STORE BY INSOLVENT FIRM—PREFERENCE OF CREDITOR—CONTEMPLATION OF INSOLVENCY—FRAUD—QUESTION OF FACT—PRIMA FACIE EVIDENCE—REBUTTAL—SUPPORT OF FINDINGS.** Upon the trial of a petition in involuntary insolvency by creditors of an insolvent firm, charging that, within thirty days next preceding, the firm had transferred its stock in trade, and the fixtures and book accounts of its store, with intent to hinder, delay, and defraud the creditors of the firm, and also in contemplation of insolvency, where the evidence showed that the transfer was made to one creditor in payment for borrowed money, and did not exceed the debt in value, and it was testified that, at the time of the transfer, there was no intention to hinder, delay, or defraud any creditors, and that the firm and each partner, though insolvent in fact, did not contemplate insolvency, or intend to file any petition in insolvency, the question of their intent to make a fraudulent preference forbidden by the Insolvent Act, is a question of fact, and not of law; and, although the fact that the transfer was out of the usual course of business, was *prima facie* evidence of fraud, yet such *prima facie* evidence might be overcome by rebutting evidence, and where the court found against any intent to defraud, and against any contemplation of insolvency, at the time of the transfer, and refused an adjudication of insolvency under the petition, its findings and judgment cannot be disturbed upon appeal for insufficiency of the evidence. (Matter of Muller & Kennedy, 432.)
- 9. RIGHT OF INSOLVENT DEBTOR TO PREFER CREDITORS.**—Except as limited by the statute, an insolvent debtor may lawfully make preferences among his creditors, even to the extent of transferring all of his property to one creditor to the exclusion of others; and a conveyance of property which pays one creditor a just debt and nothing more, is not fraudulent *per se* against other creditors of the insolvent debtor, and can only be attacked by showing that it is in violation of the insolvent law. (Id.)

See Judgment, 1.

INSTRUCTIONS.

- 1. RECOVERY LIMITED TO ALLEGATIONS OF COMPLAINT—NONCOMPLIANCE WITH CONDITION OF AMENDMENT—INSTRUCTION PROPERLY REFUSED.**—There can be no recovery beyond the allegations of the complaint without an amendment; and where an amendment was conditionally granted, and the condition was not accepted by the plaintiff, it is proper to refuse to instruct the jury in such a manner as to permit the recovery of a greater sum than that averred in the complaint. (Wise v. Wakefield, 107.)
- 2. GOODS FURNISHED BY DEFENDANT ON ORDER OF AGENT OF PLAINTIFFS—CHARGE TO THIRD PARTIES—REFUSAL OF INSTRUCTIONS—INSTRUCTION ALREADY GIVEN—PRESUMPTION OF FACT.**—Where defendant claimed credit against plaintiffs for goods furnished to third persons on order of plaintiffs' agent, some of which were charged directly to the persons receiving them, an instruction requested by the plaintiffs that the jury should not consider such items if furnished by the agent

INSTRUCTIONS (Continued).

on his individual responsibility was properly refused, where it was given in another instruction asked by plaintiffs; and a further instruction requested by them that if the goods were charged in the books of defendant to the persons who received the same, "then the presumptions are that defendant furnished the same to said parties on their own account, and not to the plaintiffs," was properly refused, because declaring to the jury a mere presumption of fact. (Id.)

See Banks, 5; Criminal Law, 2; 5, 11, 15-18, 25, 30-32, 42, 48, 50-58, 67, 72, 74, 83, 84; Libel, 3.

INTEREST. See Insolvency, 4.

INTERNAL REVENUE. See Consideration, 1-3.

INTERNATIONAL LAW. See Consuls, 1.

JUDGMENT.

1. **FORECLOSURE OF MORTGAGE—INSOLVENCY OF MORTGAGOR—COMPLAINT AND DECREE NOT ESTABLISHING PERSONAL LIABILITY—VOID AMENDMENT—ORDER QUASHING EXECUTION—REASONS FOR ORDER IMMATERIAL.**—Where the complaint upon the foreclosure of a mortgage, made between citizens of this state to secure a note made payable therein, averred that the mortgagor had been declared an insolvent, and did not aver that the mortgagee was a nonresident of the state, and did not pray for any judgment for deficiency against the mortgagor, and the complaint failed to make a case entitling the plaintiff to a decree declaring the defendant personally liable, and where the decree omitted to establish any personal liability, an ex parte amendment, made more than seventeen months after the entry of the final decree, establishing the personal liability of the mortgagor, and directing the clerk to docket a deficiency judgment against him, is without jurisdiction and void; and an order quashing executions upon such deficiency judgment must be affirmed, regardless of the reasons upon which the superior court may have based such order. (Scamman v. Bonslett, 93.)

2. **NOTICE OF MOTION TO AMEND—AMENDMENT WITHOUT NOTICE.**—Although a court may at any time, with or without notice, amend a judgment, where the record discloses that the judgment of the court was not correctly given, or where clerical misprisions have occurred, of which the record affords the evidence, yet, when an inspection of the record does not show the error, and resort must be had to evidence aliunde, notice must be given of a motion to amend the judgment to the parties affected thereby; and where an amendment is made to a judgment in matter of substance, whereby it is made to grant relief different from that granted when it was rendered, it is absolutely void as against a party having no notice of the application to amend it. (Id.)

3. **TIME FOR AMENDMENT OF JUDGMENT.**—A motion to amend a judgment where the record does not disclose the error, must be made upon notice within six months, except in cases where personal service of

JUDGMENT (Continued).

summons has not been had, in which cases the court may grant relief within one year after the entry of the judgment. (Id.)

4. **LIMITS OF POWER TO AMEND JUDGMENT—REVISION IMPROPER—CHANGE UNAUTHORIZED AT DATE OF ENTRY.**—Amendments of judgments can only be allowed for the purpose of making the record conform to the truth, and not for the purpose of revising and changing the judgment; and where the proposed addition is a mere afterthought, and formed no part of the judgment as originally intended and pronounced, it cannot be brought in by way of amendment; and, in the absence of express statutory authority so to do, no court can amend its judgments so as to include in them provisions which it could not have inserted at the date of the original entry of the judgment. (Id.)
5. **MANDATE FROM SUPREME COURT OF THE UNITED STATES—PRACTICE—STRIKING OUT USELESS ORDER.**—The action of this court, upon the presentation of a writ of mandate from the supreme court of the United States, is limited by the directions found in the writ; and where the mandate contains no reference to the affirmation of the judgment theretofore rendered by this court in the cause therein specified, it is useless for the court to reaffirm its order of judgment, and an order reaffirming it will be stricken from the record. (Estate of Blythe, 347.)

See Appeal, 2-5, 7-9, 13; Certiorari; Consideration, 2; Consuls, 6; Contempt, 1; Divorce, 1, 2; Ejectment; Justices' Courts; Municipal Corporations, 22; Partition, 2-5; Public Officers, 7, 11; Receiver.

JUDICIAL NOTICE. See Attorney General, 3.

JURISDICTION. See Certiorari; Consuls; Eminent Domain, 2; Justice's Court.

JURY AND JURORS. See Appeal, 8; Criminal Law, 19, 22.

JUSTICE'S COURT.

ACTION UPON STOCKHOLDERS' LIABILITY—PROOF AND JUDGMENT AGAINST DEFAULTING DEFENDANT—TRIAL AS TO ANSWERING DEFENDANTS—SEVERAL JUDGMENTS—JURISDICTION—MANDAMUS.—In an action in the justice's court against a number of stockholders of a corporation to enforce their individual liability for the indebtedness of the corporation to the plaintiff, there may possibly be as many diverse issues made, and as many trials had, resulting in several judgments, as there are several defendants; and proof made and judgment rendered against a defaulting defendant cannot operate as a dismissal of the action against answering defendants, or affect the jurisdiction of the court to try the cause as to them; and mandamus will lie to compel the justice to proceed with such trial. (Grinstead v. Barry, 274.)

See Certiorari, 1.

LANDLORD AND TENANT.

1. **PAROL LEASE FOR YEARS—AGRICULTURAL LAND—ANNUAL RENT—TENANCY FROM YEAR TO YEAR—A parol lease for five years is void, and no rights are**

fixed by its terms; but, when entry it made under it, the tenancy is either at will, or from month to month, or from year to year, according to the circumstances of the case; and where the land is agricultural, and the rent is to be paid annually, and is in fact paid to the lessor and accepted by him as annual rent, the holding is from year to year. (*Phelan v. Anderson*, 504.)

2. **EJECTMENT — PREMATURE ACTION BY LESSOR — RECEIPT OF ANNUAL RENT — CONFLICTING EVIDENCE — APPEAL.**—An action of ejectment will not lie in favor of a lessor who has received annual rent under a void parol lease, before the expiration of the year for which the rent was received; and where the evidence upon the question of the receipt of rent for that year is conflicting, and the verdict was against the plaintiff, the finding of the jury as to that fact is controlling upon appeal. (*Id.*)
3. **ACTION BY EXECUTRIX — POWER TO RENT PREMISES — RECEIPT OF RENT — ESTOPPEL.**—An executrix who has received annual rent from a tenant from year to year, who entered into possession of premises belonging to the estate of the decedent under a parol lease from the executor, cannot maintain an action of ejectment to oust the tenant before the expiration of a year for which annual rent was received, upon the alleged ground that the executrix had no power to lease the premises without the consent of the court in which the administration was pending. (*Id.*)
4. **EVIDENCE — COMPLAINT IN ANOTHER ACTION — ALLEGATION OF INDIVIDUAL OWNERSHIP — HARMLESS RULING.**—The admission in evidence in an action of ejectment brought by an executrix, of a complaint filed in another action, averring individual ownership in the same plaintiff, conceding it to be erroneous, is not prejudicial, where it is conceded upon both sides that the administration is not concluded, and that no distribution has been had, and all other statements in such pleading were in support of the testimony of the executrix. (*Id.*)
5. **CHANGE IN AMOUNT OF ANNUAL RENT — NUMBER OF LEASES — QUESTION OF FACT — PREJUDICIAL INSTRUCTION.**—Where there was evidence for the plaintiff tending to show that the amount of annual rent specified in the original parol lease was changed and increased by consent of the parties for the ensuing years, and that the defendant was in partial default of rent for the year in which the action was brought, it was a question of fact essential for the jury to determine as to the number and character of the leases entered into between the parties, and an instruction that the only lease established was the original parol lease for years, under which the defendant entered into possession, at a specified annual rental, is prejudicially erroneous, as touching upon a matter of fact, and taking from the jury the evidence for the plaintiff as to the change in the terms of rental. (*Id.*)
6. **LEASE — TITLE OF PERMANENT BUILDINGS.**—Where leases of land for a term of years contained no covenant or provision that the lessees might remove buildings erected by them during the term, upon permanent foundations embedded in the soil, nor that the lessor would purchase or pay therefor, and such buildings remain on the land until after the expiration of the leases, they are part of the realty, and belong to the owner of the land. (*Board of Education of City and County of San Francisco v. Grant*, 39.)

LANDLORD AND TENANT (Continued).

7. **LEASE OF SCHOOL LOTS BY CITY—ADVERTISEMENT BY SUPERVISORS—PROVISION FOR REMOVAL NOT EMBODIED IN LEASE.**—Where a notice published by order of the board of supervisors in advertising for proposals to lease school lots provided that all improvements on the lots, unless purchased or paid for by the city and county, should be removed at the expiration of the lease by the owners thereof, etc., but no such provision was inserted in the leases authorized to be executed by the mayor, such provision does not form part of the lease, and the rights of the parties must be measured alone by the terms of the lease. (Id.)
8. **PRELIMINARY NEGOTIATIONS—LEGAL EFFECT OF LEASE—ABSENCE OF FRAUD OR MISTAKE.**—Preliminary negotiations leading up to a lease, and not embodied in it, constitute no part of the final binding contracts of the parties, and the legal effect of the lease cannot be changed by reference to such preliminary negotiations, in the absence of a charge of fraud or mistake. (Id.)

See Vendor and Vendee.

LEASE. See Municipal Corporations, 12-22.

LIBEL.

1. **ABSENCE OF EXPRESS MALICE—COMPENSATORY DAMAGES—GOOD FAITH AND REASONABLE CARE PERTINENT ONLY TO PUNITIVE DAMAGES.**—Where there is an absence of express malice in the publication of a libel, there being neither a willful intent to injure the plaintiff nor gross carelessness in the publication, the recovery is limited to compensatory damages; and the questions of good faith and reasonable care are pertinent only where the question of punitive damages is involved, and not where the inquiry is confined to compensatory damages, which may be recovered without regard to the good faith or caution which attended the publication. (Taylor v. Hearst, 366.)
2. **APPEAL—LAW OF CASE—EXPRESS MALICE ELIMINATED—SECOND TRIAL—IMPERTINENT EVIDENCE.**—Where, upon a former appeal, the question of express malice was entirely removed from the case, so that plaintiff's recovery was limited to compensatory damages, evidence offered upon the second trial addressed to the good faith of the publication, and to the negligence of the publisher, is properly ruled out, as not being pertinent to the inquiry. (Id.)
3. **INSTRUCTIONS—GOOD FAITH AND REASONABLE CARE—DAMAGES—ERROR WITHOUT INJURY.**—Where the court instructed the jury as matter of law that punitive damages could not be awarded for the publication of the libel in question, an instruction as to the nature of good faith, and reasonable care, which could only be pertinent where punitive damages are involved, and had no bearing upon the facts of the case, is error without injury. (Id.)
4. **AMOUNT OF COMPENSATORY DAMAGES.**—An award of five hundred dollars for compensatory damages for the publication of a libel without express malice cannot be regarded as excessive. (Id.)

LIEN.

1. ACTION—SPECIFIC PERFORMANCE OF CONTRACT—FORECLOSURE—JURISDICTION OF EQUITY—SETTLEMENT OF ADMINISTRATRIX—SURVIVING PARTNER—CONVEYANCE—ASSUMPTION OF FIRM DEBT—PROPERTY CONVEYED.—A court of equity has jurisdiction of an action for the specific performance of a contract, and for the foreclosure upon real property conveyed by the administratrix of a deceased partner to the surviving partner, under a written agreement of settlement of the firm debts, which was approved by the probate court, and by which it was agreed, among other things, that the surviving partner should assume and pay the notes of the firm to a bank, and that indebtedness was made a charge or lien upon the property conveyed, and it is immaterial to the jurisdiction of equity to enforce the agreement in such case, whether the action for specific performance of the agreement could be maintained alone or not. (*Kreling v. Kreling*.)
2. PRINCIPAL AND SURETY—ACTION BY SURETY TO ENFORCE PAYMENT BY PRINCIPAL—PREVIOUS PAYMENT NOT ESSENTIAL.—By the assumption of the firm notes to the bank by the surviving partner, he became the principal debtor, as between himself and the estate of the deceased partner, and that estate became a surety; and the administratrix of that estate was authorized to bring an action to enforce payment of the notes by the principal without first making payment herself. (*Id.*)
3. CONSTRUCTION OF AGREEMENT—CREATION OF LIEN.—A lien is a charge imposed upon specific property and may be created by contract between parties, or by operation of law; and the provisions of an agreement that property to be conveyed by the administratrix of a deceased partner to the surviving partner was to be chargeable only with the debts of the firm, excepting an indebtedness to a bank, which the surviving partner agreed to assume and pay, are to be construed as making the payment of that indebtedness a charge or lien upon the property conveyed, and such charge or lien was not rendered ineffectual by the fact that the property had not been conveyed until the date of the agreement, but the lien agreed for attached to the property at the time of the conveyance of the property pursuant to the terms of the agreement. (*Id.*)

See Taxation, 7, 8.

MANDAMUS.

1. INSUFFICIENT PETITION—SUBSTITUTION OF ATTORNEYS—NOTICE OF MOTION—PRESUMPTION.—A petition for a writ of mandamus to a superior judge to make an order of substitution of attorneys in a case pending before him, upon the application of the client after the attorney of record, without his consent filed or entered in the minutes, is insufficient to justify the issuance of the writ, if the petition does not state or show that written notice of the motion for substitution was served upon the attorney of record at least a reasonable time before the hearing; and, as every intendment is in favor of the regularity and propriety of the order made, it must be presumed that the contrary is not made to appear, that the court properly exercised its discretion to deny the motion for insufficiency of such notice. (*Rundberg v. Belcher*, 589.)

MANDAMUS (Continued).

2. **WRIT, WHEN AND WHEN NOT ALLOWED—JUDICIAL DISCRETION.**—While the writ of mandate will lie to compel judicial action, and in some instances even specific action, and is an appropriate remedy, in a proper case, to compel the substitution of attorneys, it may not be invoked to require a judicial officer to act in a particular way, unless it appears by necessary legal deduction from the facts stated that the aggrieved party has been denied a right which it was the plain legal duty of the officer to grant and without his proper discretion to refuse; and, as the requirement of an order of court substituting attorneys upon application of the client involves judicial action, the requirement of a notice as the basis of such order implies at the very least the exercise of sufficient discretion to determine whether the proper notice was given. (Id.)
3. **AVERTMENT OF CONTINUANCES OF HEARING—APPEARANCE OF ATTORNEY NOT SHOWN.**—An averment in the petition for the writ of mandate that the motion for the substitution of attorneys, "after several continuances, came on regularly for hearing," does not supply a defect in the petition in not showing sufficient notice of the hearing, where it is not alleged that the attorney of record appeared at any of the continuances or at the final hearing. (Id.)

See Counties, 3; Justices' Court; Municipal Corporations, 4, 6; Taxation, 11.

MAP. See Partition, 1, 2.

MASTER AND SERVANT. See Negligence, 1-7.

MEASURE OF DAMAGES. See Damages.

MECHANICS' LIEN.

1. **CONSOLIDATED MINING CLAIMS—OPERATION AS ONE MINE—CLAIMS OF LIEN.**—Mining claims severally located on the same ledge and consolidated in one mining company, and worked by it as one mine, may, for the purposes of the mechanics' lien law, be regarded and treated as a single claim, and declared on as such; and claims of lien may be filed upon the property as a whole, without specifying the particular claim or location upon which work was done, or the amount due for labor on each claim, although the lien claimant worked on more than one location. (Hamilton v. Delhi Mining Company, 148.)
2. **FINDING AS TO OPERATION OF CLAIMS—CONCLUSION OF FACT AMONG CONCLUSIONS OF LAW.**—A finding that the claims were operated as one mine is none the less a conclusion of fact, because placed among the conclusions of law; and whether it is regarded as an independent finding of fact, or a deduction from special facts found, is immaterial, where the special facts found are sufficient to support the conclusion of fact. (Id.)
3. **CONTRACTS WITH OWNERS OF SEVERAL LOCATIONS—CONSOLIDATION NOT AUTHORIZED BY OWNERS—KNOWLEDGE OF FACTS—ABSENCE OF NOTICE TO LIEN CLAIMANTS—ESTOPPEL.**—Where the owners of the several locations made several contracts with one person to sell to him their respec-

tive claims, with the right in him or his assigns to work each claim during the existence of the contract therefor, and such person organized a mining company, to which all of the several contracts were assigned, and the consolidated claims were worked by it as one mine, to the knowledge of the owners of the several locations, and with the purpose and effect of enhancing the value both of the property as an entirety, and of each of the several locations embraced therein, the absence of express authorization for such consolidation in the several contracts is immaterial, and such owners are to be deemed to have authorized the improvement for that purpose, within the provisions of section 1192 of the Code of Civil Procedure, in the absence of the posting of the notice required by that section, that they would not be responsible for such work; and they are estopped, as against lien claimants, from objecting to want of authority for the consolidation. (Id.)

4. **MORTGAGE BY OWNERS AND JUDGMENT LIEN SUBORDINATE TO LABORERS' LIENS.**—A mortgage executed by the owners of the several mining locations prior to the commencement of work upon the improvement of the consolidated claims as one mine by the mining company, but not recorded until after the cessation of such work, is subordinate to the liens of laborers employed thereupon by the mining company, having no notice or knowledge thereof, as is also a judgment lien docketed against such owners subsequently to such work. (Id.)
5. **LEASE OF MACHINERY AND IMPLEMENTS—OPTION TO PURCHASE—TITLE IN LESSOR—NONUSE IN MINE—LIENS NOT OPERATIVE.**—Where the mining company held a lease of certain mining machinery and implements belonging to another company, at a fixed rental, with option to purchase, with a provision that title should remain in the lessor until the purchase money was paid, such portion of the machinery and implements as were not used in the working or developing of the mine, nor in any manner affixed thereto, are not part of the realty, nor subject to the liens of laborers upon the mine. (Id.)
6. **DESCRIPTION OF WORK—ERECTION OF BUILDING.**—Where the work for which a claim of lien was filed consisted of the almost entire demolition of an old house, and the building of a substantially new structure in its place, it is sufficient to describe the work in the claim as the "erection" of a house, although a small part of the old building was embodied in the new. (Ward v. Crane, 676.)
7. **COMPLETION OF WORK—DISCHARGE OF CONTRACTOR.**—Where a mechanic, engaged by the day to erect a building, under the control of the owner, is discharged by him when the work was on the verge of full and actual completion, the owner undertaking to finish it, such discharge is equivalent to an acceptance of the work as a completed contract for the erection of the building, and the notice of lien may be properly filed at any time within thirty days thereafter. (Id.)
8. **FORECLOSURE OF LIEN—FINDING—SIZE OF LOT—USE AND OCCUPATION.**—In an action to foreclose a mechanic's lien, a finding, following the allegation of the complaint, on which no issue was raised by the answer, that all the lot on which the building was erected was neces-

MECHANICS' LIEN (Continued).

sary to the "convenient use and enjoyment" thereof, will be construed to mean "convenient use and occupation," and, in the absence of evidence as to the size of the lot, it will be presumed, in support of the judgment, that the whole of it is necessary for the convenient use and occupation of the dwelling. (Id.)

MINES AND MINING.

1. **CORPORATIONS—GENERAL POWER TO PURCHASE—PRESUMPTION—BURDEN OF PROOF AS TO EXCEPTION.**—Every corporation is presumed to have power to purchase and hold real estate, and if there is anything in its charter, or the business in which it is engaged, or the law under which it is organized, abridging this power, it must be shown affirmatively by the person assailing its title, else a conveyance to it will be deemed valid. (*Granite Gold Mining Co. v. Maginness*, 131.)
2. **PURCHASE OF MINING CLAIM BY MINING CORPORATION—ASSENT OF STOCKHOLDERS—CONSTRUCTION OF STATUTE—"ADDITIONAL MINING GROUND"—PROOF REQUIRED.**—The general presumption of the power of corporations to buy and sell real property must prevail in case of a mining corporation, except in those cases where the facts appearing of record show affirmatively that the case is one within the restrictions of the act of April 23, 1880, for the further protection of stockholders in mining companies; and where a mining corporation purchases a mining claim, formal assent of the stockholders is not required in order to the validity of the conveyance to it, unless it affirmatively appears that the corporation already has mining ground prior to the purchase and that the purchase is of "additional mining ground." (Id.)
3. **CONVEYANCE AT ORGANIZATION OF MINING CORPORATION—CONSIDERATION FOR STOCK.**—Where it appears that a conveyance of a mining claim was made to a mining corporation at the time of its organization, in consideration of the issuance of its stock to the grantors in the conveyance, it is to be inferred that the corporation then owned no other mining ground, and that the conveyance is valid without formal action of the stockholders. (Id.)

See *Mechanics' Lien*, 1-5.

MISTAKE. See *Partition*, 2, 3, 5.

MORTGAGE.

1. **ACTION TO DETERMINE PRIORITY—PRIOR RECORDATION OF SECOND MORTGAGE—NOTICE—FINDINGS—OMISSION TO FIND UPON CONSTRUCTIVE NOTICE—FACTS PUTTING UPON INQUIRY—APPEAL.**—In an action to determine the priority of plaintiff's mortgage, which was first executed, over defendant's mortgage upon the same property which was later in execution, but prior in recordation, where there was evidence upon the question of constructive notice, which it was necessary for the trial court to pass upon, and to determine whether the defendant did or did not have actual notice of circumstances sufficient to put a prudent man upon inquiry as to the fact of the existence of the prior mortgage, of which he might have learned by

prosecuting such inquiry by ordinary diligence and understanding, it is not sufficient for the court to find that the defendant had no actual notice of its existence, but the question of constructive notice thereof must also be passed upon, and, in case of omission to find thereupon, a judgment in favor of the defendant must be reversed upon appeal. (*Prouty v. Devin*, 258.)

2. **BANK—GENERAL DEPOSIT CANNOT BE APPLIED TO MORTGAGE INDEBTEDNESS.**—Under section 726 of the Code of Civil Procedure, providing that "there shall be but one action for the recovery of any debt . . . secured by mortgage," a bank, holding a debt secured by a mortgage, cannot apply, in reduction or cancellation of the debt, a claim due by it to the mortgagor, founded upon a general and ordinary deposit of money with it by the mortgagor. (*McKean v. German-American Savings Bank*, 334.)
3. **SETOFF—CROSS DEMANDS.**—In an action to recover such a deposit, the bank is not entitled, under section 438 of the Code of Civil Procedure, to set off the amount due it on the mortgage indebtedness, nor are such cross-demands deemed to be compensated, as far as they equal each other, under section 440 of such code. (*Id.*)
4. **FORECLOSURE—MORTGAGEE IN POSSESSION—AVERMENT OF RENTAL VALUE—EVIDENCE.**—In an action to foreclose a mortgage, by a mortgagee who who had been in possession of the mortgaged premises, an averment in his complaint "that the rents and profits of the said premises for the time plaintiff has had and received the same does not exceed three hundred dollars for the first year, four hundred and fifty dollars for the second year, and five hundred dollars per annum for the remaining portion of the time which plaintiff possessed the same," is an admission that the rental value for the second year was four hundred and fifty dollars, and for the balance of said time five hundred dollars per annum; and it is error for the court, on the trial, to permit the plaintiff to introduce evidence showing a less rental value during such time; and a judgment based on a finding of a less rental value for such period will be modified on appeal to conform to the pleading. (*Malone v. Roy*, 512.)
5. **FINDING.**—The rental value of the premises for times not covered by such averment is not concluded thereby, and, where the evidence as to the value is conflicting, the finding thereon will not be disturbed. (*Id.*)

See Ejectment; Judgment, 1.

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL ORDINANCE—OBSTRUCTION OF STREETS WITHOUT PERMIT—REFUSAL OF PERMIT—PERMIT TO RIVAL COMPANY—POSTS FOR ELECTRIC LIGHTING—INJUNCTION—REMEDY TO COMPEL PERMIT.**—An ordinance which requires a special permission to be obtained from the board of supervisors, before the streets can be obstructed, is reasonable; and although an electric lighting company was unjustly refused permission to erect posts upon the streets for purposes of electric lighting, and such refusal was an unfair and unjust discrimination against such company, and in favor of a rival company to which such permission had

MUNICIPAL CORPORATIONS (Continued).

been granted, yet an injunction will not lie in favor of the company to which the permit was refused, to restrain the superintendent of streets and the city from interfering with the erection of such posts without a permit, its only proper remedy being to compel the granting of a permit in a proper case. (*Mutual Electric Light Co. v. Ashworth*, 1.)

2. **CONSTITUTIONAL LAW—INVALID STATUTE—MODE OF PAYING FEES—ARBITRARY CLASSIFICATION—SPECIAL LEGISLATION—ACCOUNTABILITY OF OFFICERS FOR FEES.**—The act of 1893, p. 127, providing and regulating the manner of receiving and paying fees, etc., in cities and cities and counties having a population of over one hundred thousand inhabitants, and prescribing the duties of officers with reference thereto, and requiring a certificate to be issued by an officer of whom service is demanded, to be delivered to the treasurer with the required fee, and that a receipt for the money from the treasurer be returned to such officer before the required service can be performed, is not intended for the convenience of the public, but for the protection and security of the municipality. Such act is unconstitutional and invalid for being based upon an arbitrary distinction, there being no reason why attempted protection should be accorded to a city of one hundred thousand inhabitants, and not to one of less population, and for being special legislation in a case where a general law can be made applicable, and also for violating the constitutional requirement that the legislature, by general and uniform laws, shall provide for the strict accountability of officers for all fees which may be collected by them. (*Rauer v. Williams*, 401.)
3. **CLASSIFICATION OF MUNICIPAL CORPORATIONS—RELATION TO SPECIAL LEGISLATION.**—The object of classifying municipal corporations according to population, and forbidding their creation by special laws, was to avoid the necessity of special legislation; and the legislature cannot pass laws touching the organization and incorporation of municipalities, except by conforming to the requirements of the classification act; but, upon other matters, it may pass general and uniform laws applicable either to municipal corporations of a given class, or to all of a separate class created by and designated in the act itself, provided some plain reason appears for the limitation to a class where the law does not apply to all municipalities within the same general category: yet a law is not necessarily a general law merely because it operates upon all municipalities within a specified class, and it is special if it applies merely to all within a class, without reason appearing why it is not made to apply generally to all municipal corporations. (*Id.*)
4. **DISINCORPORATION OF MUNICIPALITY—MANDAMUS—CALL FOR ELECTION—SUFFICIENCY OF PETITION.**—Under the act of 1895 requiring the board of trustees of a city of the sixth class to call an election on the question of disincorporating the municipality, upon receiving a petition in that behalf signed by not less than one-fourth of the qualified electors of the municipality, it is no objection to the sufficiency of the petition that it did not represent the subscribers as qualified electors, but described them only as citizens of the city, if the signers were qualified

electors in fact; and where the complaint in *mandamus* to compel the call of the election avers that the petition was signed by the requisite number of qualified electors, it is the fact of the receipt of such a petition, and not the fact that it describes the subscribers as electors, which under the statute imposes the obligation to call the election. (*Frederick v. City of San Luis Obispo*, 391.)

5. **INQUIRY BY BOARD OF TRUSTEES—QUALIFICATION OF SIGNERS TO PETITION.** Whether the names subscribed to the petition were those of electors is matter for consideration by the board; and an affirmative allegation of that fact in the petition would neither preclude nor materially aid the inquiry. (*Id.*)
6. **COMPLAINT FOR MANDAMUS—"PARTY BENEFICIALLY INTERESTED"—OWNER AND TAXPAYER.**—It is sufficient in a complaint for *mandamus* to show that the complainant is a "party beneficially interested," within the meaning of section 1086 of the Code of Civil Procedure, to aver that he is a property owner and taxpayer. (*Id.*)
7. **SAN DIEGO—EMPLOYMENT OF SPECIAL COUNSEL.**—Under chapter 5 of the charter of the city of San Diego (Stats. 1889, p. 664), the common council has power to employ special counsel. This power may be exercised either by the joint resolution of the two boards, or by ordinance, since the charter vests the power in the common council, and does not prescribe the mode in which it shall be exercised. (*Pollok v. City of San Diego*, 7.)
8. **CERTIFICATE OF AUDITOR—APPROPRIATION OF MONEY—CONSTITUTIONAL LAW.**—The provision of chapter II, section 14, of such charter (Stats. 1889, p. 659), that all ordinances or resolutions appropriating money or incurring indebtedness or liability against the treasury, before being passed, shall have the certificate of the auditor in writing thereon to the effect that such appropriation can be made or indebtedness incurred without the violation of any of the provisions of the charter, is constitutional, and a resolution purporting to incur an indebtedness or create a liability, without such certificate, is void and ineffectual to create a contract. (*Id.*)
9. **ORDINANCE OPERATING AS RESOLUTION.**—An ordinance of the city of San Diego, so certified to by the auditor, providing for the employment of special counsel, and for the payment to him of a retainer, and further compensation to be paid upon the completion of future legal services which might happen within the year, operates as an appropriation of so much of the fund of that year as may be necessary to pay such compensation, and upon being vetoed by the mayor, and not again acted upon by the common council, can have no effect as an ordinance; nor can it be given effect as a joint resolution, because, by subdivision 40 of section 1, chapter 2, of the charter (Stats. 1889, p. 654), the allowance and payment of compensation of special counsel must be by ordinance, and it will be presumed that the common council did not intend to enter into a contract unless at the same time an appropriation of funds should be made which would enable the city to perform its part thereof. (*Id.*)

MUNICIPAL CORPORATIONS (Continued).

10. **ORDINANCE INTRODUCED IN PURSUANCE OF RESOLUTION.**—That the common council did not intend the ordinance to operate as a resolution, so as to create a contract for the employment of special counsel, will be further presumed from the fact that the ordinance was introduced in pursuance of a prior resolution providing therefor. (Id.)
11. **SUBSIDY FOR RAILROAD—ILLEGAL CONTRACT.**—A municipal corporation not authorized to grant aid to a railroad cannot, directly nor indirectly, make any contract for the payment of money, where an indefinite and inseparable part of the stipulated amount is payable in consideration of the unlawful object of subsidizing a railroad. (*Higgins v. City of San Diego*, 524.)
12. **VOID LEASE OF WATER PLANT TO CITY—CONDITION FOR BUILDING RAILROAD—EVASIVE CONTRACT—LEASE TO NOMINAL PARTIES—SUBLEASE TO CITY WITHOUT CONDITION.**—A lease to a city by a water company of its entire plant for a term of years, in which the rent reserved is in part consideration of a condition that the water company shall construct a railroad within a specified time, is invalid and void; and where, by an evasive contrivance, the lease containing such condition was made to nominal parties, who, in accordance with the understanding, immediately subleased the plant to the city for the entire term, and for the full amount of rental, but without expressing such condition in the sublease, and the city was thereby induced to agree to pay, under the name of rent, the whole consideration for the undertaking of the water company to build the railroad, and thus indirectly to subsidize the railroad, the contracts of lease and sublease are wholly void from their inception. (Id.)
13. **OPTION TO TERMINATE LEASE—VOID PURCHASE BY CITY—RIGHTS OF NOMINAL LESSEES.**—The city not being permitted to subsidize a railroad directly or indirectly, could not buy an option, to be exercised either by itself or by others, to terminate its agreement to pay rent, upon failure of the lessor to build a railroad; and although the right to terminate the agreement for failure to construct the railroad was left in the nominal lessees, it is immaterial whether that right was to be exercised in their own behalf and at their own discretion, or as trustees for the city. (Id.)
14. **CONDITION SUBSEQUENT—CONSIDERATION.**—The fact that the condition for the construction of the railroad was put in the form of a condition subsequent, upon the breach of which the lease might be terminated, does not prevent the condition from forming part of the consideration for the stipulated payments of rent; but the option to terminate the lease for breach of such condition is valuable to the party paying the rent, and burdensome to the party charged with the condition, and is a good consideration for the agreement to pay the rent. (Id.)
15. **WAIVER OF CONDITION—NONPERFORMANCE—VOID CONTRACT.**—The contract being void for want of power in the city to expend corporate funds in aid of the construction of a railroad, it cannot aid the contract that the city waived compliance with the condition for its construction, and it is immaterial that the railroad was never constructed or operated, or that its construction was never commenced. (Id.)

16. **VOID RESOLUTION OF COUNCIL AS TO LEASE—ABSENCE OF AUDITOR'S CERTIFICATE—NO PRESUMPTION OF AUTHORITY.**—A resolution of a city council authorizing the mayor to execute a lease of a water plant, which had not previous to its passage been presented to the auditor as required by the city charter, and which lacked his required certificate that the contemplated indebtedness or liability could be incurred without a violation of the restrictions imposed by the charter, is fatally defective and void; nor had the water company the right to presume that the council would not have authorized the mayor to act, in violation of the charter, without the proper certificate of the auditor. (Id.)
17. **VALIDITY OF CHARTER PROVISION.**—The provision of the city charter requiring the auditor's certificate is not invalid, as being an attempt to invest a ministerial officer with judicial powers and functions; but such provision is a mere restriction upon the legislative power of the council, requiring them to go to the best source of information for the fact upon which their right to act depends. (Id.)
18. **SUPPLY OF WATER FOR CITY—ORDINANCE REQUIRED—JOINT RESOLUTION NUGATORY.**—Where the only authority conferred upon the council by the charter to adopt and carry out means for securing a supply of water for the use of the city and its inhabitants is found in the enumeration of matters as to which the council is empowered to pass ordinances, which cannot take effect without publication, an unpublished joint resolution authorizing the mayor to lease a water plant is nugatory. (Id.)
19. **CONTRACT FOR FUTURE PAYMENT BY CITY—CASE AFFIRMED.**—The case of *McBean v. Fresno*, 112 Cal. 159, affirmed as to the power of a city to make contracts *in futuro*, involving the payment of moneys annually during a long period of time, without violating the provision against indebtedness in excess of revenue, if the annual payment does not exceed the revenue for the year in which it is to be made, and also as to the conditions under which such contracts may extend beyond the term of office of the trustees who authorize it. (Id.)
20. **INVALID CONTRACT—RATIFICATION—ESTOPPEL.**—Where the objection to a contract made by a city for the lease of a water plant is that it is void as involving a subsidy for a railroad, the contract is incapable of ratification, directly or indirectly, and the city cannot be estopped from denying the validity of the contract because the water company was required by the city to expend a large sum of money in extending the plant, and because the city refused to redeliver possession of the plant when demanded. (Id.)
21. **GENERAL POWER OF CITY AS TO WATER SUPPLY—LEASE OF PLANT FROM YEAR TO YEAR—REASONABLE VALUE OF USE—PROVISION AGAINST EXCESS OF REVENUE.**—Although the express contract of the city to lease the water plant for a term of years at a fixed rental was invalid and void, yet as the city has the general power to contract for a water supply for itself and its inhabitants, it may lease a water plant for a year, and renew it from year to year, and it is liable to pay the reasonable value of the use of the plant actually enjoyed, provided the claim of the water company for the reasonable value of the use does not exceed the amount of unappropriated revenue for the respective fiscal years during which the city had the use of the plant; but claims

MUNICIPAL CORPORATIONS (Continued).

for such use accruing at a time when there were no unappropriated funds to meet them are void, like other claims upon exhausted revenues, and will not warrant a judgment of any character. (Id.)

- 22. FORM OF JUDGMENT FOR REASONABLE VALUE OF USE—GENERAL JUDGMENT AGAINST CITY—PROVISION AS TO PAYMENT.**—A judgment for the reasonable value of the use of the water plant, after ascertaining in what years the claims of the water company for such value were not in excess of the unappropriated revenues of that year to meet them, should not be rendered so as to be payable only out of those revenues, but should be in the form of an ordinary general judgment for whatever amount shall be found due, without any direction as to the revenues out of which the judgment shall be satisfied, or any direction as to the method of its payment, for which some future provision might be made by the city, although there might be no revenues of the fiscal year in which the debt was incurred out of which it could be satisfied. (Id.)

See Counties; Elections; Schools; Streets, Roads and Highways; Water Front; Water and Water Rights, 4-16.

MURDER AND MANSLAUGHTER. See Criminal Law.**MUTUAL BENEFIT SOCIETIES.**

- 1. VOLUNTARY SOCIETIES—DISCIPLINE OF MEMBER OF ROYAL ARCH MASONS—RULES—IMPROPER SUIT TO RESTRAIN TRIAL—DEMURRER TO COMPLAINT.**—An action will not lie to restrain a voluntary society of Royal Arch Masons from proceeding in accordance with their rules with the trial of a member upon charges of having violated the disciplinary laws of the order, and a complaint in such action which does not charge that the proceedings taken against him are not in accordance with the rules of the order, or that he has been deprived of any privileges accorded by these rules, and which does not state that the rule which he is charged with violating was not regularly and properly adopted by the grand chapter, and did not receive the approval of a majority of the members of that body, but only charges in general terms that the rule was the result of a conspiracy, and that the charges preferred and the proceedings taken against him are part of the conspiracy, does not state a cause of action, and a demurrer thereto is properly sustained. (Lawson v. Hewell, 613.)
- 2. RULES, MATTER OF CONTRACT—DISCIPLINE AGREED UPON—JURISDICTION OF COURTS.**—The rules adopted by those who associate themselves in a voluntary fraternal organization, prescribing conditions of membership or of its continuance, and laws of conduct for members, with penalties for their violation, and the tribunal and mode in which the offenses shall be determined and the penalty enforced, constitute their agreement, and, if not contravening some law of the land, are regarded in the same light as the terms of any other contract, and the members must be regarded as having voluntarily submitted themselves by agreement to the disciplinary power of the body in accordance with its rules; and the courts will not interfere unless there is involved the determination of some civil or property right, and then their jurisdiction is limited to inquiring whether the rules prescribed

MUTUAL BENEFIT SOCIETIES (Continued).

by the organization for the determination of the right to be allowed. (Id.)

3. **ADOPTION OF RULE BY MAJORITY VOTE—CHARGE OF CONSPIRACY.**—It is a misuse of terms to charge that the vote of a majority of the members of a representative body adopting a rule of order is the result of a conspiracy; nor can the term "conspiracy" be applied to the deliberate vote of a governing body. (Id.)

4. **POWER AND DISCRETION OF GOVERNING BODY—INTERFERENCE.**—The duly chosen and authorized representatives of the order are vested with power and discretion to determine for the best interests of the order, and what shall be done for economy, or whether a change therein is demanded, and have no standard by which to determine the propriety of an action, nor will they take cognizance of matters arising under a rule, nor interfere with questions of policy, discipline, nor with the discretion of the governing body, nor is an arbitrary invasion of private rights. (Id.)

5. **REDRESS OF DISCIPLINED MEMBER—RIGHT OF APPEAL EXCLUDED.**—If a disciplined member has received notice of a hearing and has been found to have violated a rule of the order, and is being tried in accordance with its rules, and has a right of appeal to the governing body from any adverse decision at the hearing, so long as he has a right of redress within the order, he has no right to invoke the aid of the courts. (Id.)

6. **CONTRACT OF MEMBERS—CHANGE OF RULES.**—The contract between the members of a voluntary association is to be determined by a consideration of the entire body of the rules governing the association, and is not limited to those existing at the time of becoming such; and unless the rules have placed a limit on the power of the association to make any change or amendment therein, any amendment or change adopted in accordance with the mode provided by the association therefor is binding on the members. (Id.)

7. **INSUFFICIENT PLEADING AS TO NEW RULE.**—The averment in a complaint by a disciplined member that the attempt to expel him is a violation of the contract with him, and that the rule under which his expulsion is sought created a breach in his contract, and was in violation of the constitution of the order, is insufficient, in the absence of averments of the particulars of the contract of membership, and where the rule was violated, or the particular provision of the constitution was violated by the adoption of the rule. (Id.)

8. **INTEREST IN PROPERTY INCIDENTAL TO MEMBERSHIP—FORFEITURE OF MEMBERSHIP—JURISDICTION OF COURTS.**—The interest of a member in the property of the order accumulated by the payment of annual dues, and his right to participate in its disposition, and to be assisted therefrom in case of need or distress, is merely an incident to his membership, and will cease upon his ceasing to be a member. It does not constitute any such interest in property as will survive expulsion, if he has forfeited his right of membership by his conduct, or give to the courts the right to prevent the expulsion of the member, or to determine its sufficiency. (Id.)

MUTUAL BENEFIT SOCIETIES (Continued).

9. **MUTUAL BENEFIT ASSOCIATION—PAYMENT FROM RESERVE FUND—CHANGE OF BY-LAWS—PROVISION FOR CHANGE—HARMLESS AMENDMENT.**—A member of a mutual benefit association cannot complain of an amendment to the by-laws providing that a payment of two thousand dollars should be made out of the reserve fund only when there is a sufficient excess over fifty thousand dollars, where the amendment was made in pursuance of a by-law which permitted it, and which was in force when the membership of such member commenced, and especially where at that time there was a rule which fixed the excess at two hundred thousand dollars, thus making the amendment to the benefit and not to the detriment of such member. (*Hass v. Mutual Relief Association of Petaluma*, 6.)
10. **BY-LAWS PART OF CONTRACT.**—All of the by-laws, rules, and regulations of a mutual benefit association become part of its contract with its members, whether referred to in the contract or not, and all of them must be read together. (*Id.*)
11. **FINDINGS AGAINST EVIDENCE—INTENTIONAL DEPLETION OF RESERVE FUND—AMOUNT OF FUND—ORDER GRANTING NEW TRIAL—PRESUMPTION UPON APPEAL.**—Where a finding that the reserve fund was purposely depleted in order to evade payment of dues to beneficiaries is without evidence or allegation to support it, and a finding that there was more than fifty thousand dollars in such fund was unsustained by the evidence, and the court granted a new trial upon motion of the defendant, after having rendered judgment in favor of the plaintiff in too large an amount, based upon the findings, the presumption upon appeal from such order is against the findings, and not in their favor, and the order will be affirmed. (*Id.*)
12. **NATURE OF RESERVE FUND—ABSENCE OF RULE CREATING IT.**—Where there is no by-law or rule creating a reserve fund, or defining of what it shall consist, and certain moneys are specially devoted to other purposes, the net assets are to be treated as belonging to that fund which are not specially devoted to other purposes. (*Id.*)
13. **BURDEN OF PROOF AS TO EXCESS—DEDUCTIONS FROM ASSETS—OVERDRAFTS.** Where a by-law provides that a certain payment is to be made out of the reserve fund only where there is an excess over fifty thousand dollars, the burden of proof is upon the plaintiff claiming such payment, to prove that there was such excess in the reserve fund, after deducting from the assets funds devoted to special purposes, and also deducting the amount of an overdraft from bills receivable. (*Id.*)

NEGLIGENCE.

1. **MASTER AND SERVANT—CARELESS DRIVING OF BULL IN HIGHWAY—SERVANT'S KNOWLEDGE OF VICIOUSNESS—IGNORANCE OF MASTER.**—Where injuries were inflicted upon the plaintiff by a vicious bull negligently driven in the highway by servants of the defendant, to whom the care of the animal was intrusted, without their securing it in any way, notwithstanding knowledge on their part that the bull was wild and would fight, and that it had previously knocked another man down on the same day, and had threatened attack upon

NEGLIGENCE (Continued).

others, the defendant is liable for such injuries, although he may have had no previous knowledge of the viciousness of the bull. (*Clowdis v. Flume and Irrigation Company*, 815.)

2. **INJURY FROM VICIOUS ANIMAL—KNOWLEDGE OF OWNER—KNOWLEDGE OF SERVANT, WHEN IMPUTED TO MASTER.**—In order to enforce the liability of the owner of an animal for injuries inflicted thereby to another person, it must appear that the animal was in fact vicious, and that the owner had knowledge of its viciousness, actual or imputed; and though knowledge by or notice to a servant of the viciousness of the master's animal, with respect to which he is charged with no duty, is not notice to the master, yet the knowledge of a servant to whom an animal is intrusted, of its vicious or ferocious disposition, is the knowledge of the master, sufficient to render him liable for injuries caused by such animal while in the custody and control of such servant. (*Id.*)
3. **OWNER WITH NOTICE OF VICIOUSNESS, LIABLE AS INSURER—NEGLIGENCE IMMATERIAL.**—Where injury is caused by a vicious animal which the owner knew to be vicious, at the time of and previous to the injury, the owner is liable as an insurer, and the question of negligence in such case is immaterial. (*Id.*)
4. **REPRESENTATION OF MASTER BY SERVANT—DUTY TO PUBLIC—IMPROPER PERFORMANCE.**—Where a duty is owed to the public, a servant to whom its performance is intrusted represents the master, however subordinate or menial his rank may be, and within the scope of his employment to perform such duty, his knowledge is the master's knowledge, and his acts the master's acts, and the inquiry as to the master's responsibility is the same as if he had personally entered upon the performance of the duty, under the same circumstances, and with the same knowledge possessed by his servant; nor can a failure to perform such duty, or its improper performance, be excused by showing that its execution was intrusted to a servant even of approved carefulness, knowledge, or skill, but it must be further shown that the servant in the particular matter exercised the full degree of care, and showed the requisite amount of skill. (*Id.*)
5. **NEGLIGENCE OF SERVANTS—KNOWLEDGE OF MASTER IMMATERIAL—KNOWLEDGE ACQUIRED BY SERVANTS DURING PERFORMANCE.**—The master is liable to third persons for injuries caused by the negligent performance of the duty of his servants while acting within the scope of their employment, and, in such case, all question as to the master's knowledge is eliminated as immaterial; and the fact that additional knowledge of facts material to the question of negligence of such servants was acquired by them after the employment was undertaken, and that the master was wholly ignorant of those facts, cannot exonerate the master from liability for the negligence of his servants. (*Id.*)
6. **JOINDER OF CAUSES OF ACTION IN ONE COUNT—INJURY FROM ANIMAL KNOWN TO BE VICIOUS—NEGLIGENCE OF SERVANTS—INSTRUCTIONS UPON EACH CAUSE OF ACTION—CONFUSION WITHOUT PREJUDICE—APPEAL.**—Where the complaint joined in one count two distinct causes of action, one for injury caused by a vicious bull of defendant

NEGLIGENCE (Continued).

which defendant knew to be vicious, and the other for injury caused by the negligent performance of duty by the servants of the defendant in the care and driving of the animal intrusted to them by the defendant, and issue was joined upon each cause of action, without objection to their union in one count, and the evidence upon each cause of action was sufficient to uphold a verdict for plaintiff upon either, an instruction that before plaintiff could recover he must establish the facts that the bull at the time he inflicted the injury was vicious, and that defendant had knowledge of its vicious character, and another instruction that defendant was liable for injury resulting from the negligence of defendant's employees in the performance of their duty, are not contradictory or self-destructive; and whatever confusion may have resulted from failure to point out clearly to the jury the full distinction between the two causes of action must have tended to defendant's advantage, and is not ground for reversal of a judgment in favor of plaintiff, upon defendant's appeal therefrom. (Id.)

7. **DAMAGES—VERDICT NOT EXCESSIVE—CONFLICTING EVIDENCE—PROOF FOR PLAINTIFF.**—Where there was conflicting evidence as to the nature and permanence of the injuries received by plaintiff from the attack of a vicious bull, for which defendant is liable, but, on the part of the plaintiff, it was shown that the coccyx was fractured, the muscles of the region atrophied, the sciatic nerve made tender and painful to pressure, and that there were other symptoms of spinal injury, upholding a finding that plaintiff's health was seriously impaired, if not positively wrecked, it may not be said that a verdict for the plaintiff for damages in the sum of five thousand five hundred dollars was excessive. (Id.)
8. **OPERATION OF ELECTRIC RAILWAY—DEATH OF CHILD—APPEAL—CONFLICTING EVIDENCE—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.** The credibility of witnesses is a question for the jury; and where, in an action for negligence against an electric railway company for such careless operation of its cars as to cause the death of an infant child of the plaintiff, the testimony of two witnesses for the plaintiff tends to prove the negligence of the defendant, as against conflicting evidence to the contrary, a verdict of the jury for the plaintiff cannot be disturbed upon appeal, upon the ground that such witnesses were unworthy of credence, where there is nothing so inherently or otherwise manifestly incredible in their testimony as to justify the court in ignoring it. (Fox v. Oakland Consolidated Street Railway, 55.)
9. **NEGLIGENCE, WHEN A QUESTION OF FACT.**—Negligence is not absolute, but is relative to circumstances, and it is very rarely that a set of circumstances is presented which enables the court, as matter of law, to say that negligence has been shown, but, as a general rule, it is a question of fact, or of inference of fact, to be deduced by the jury from the circumstances proved; and even conceded facts, where there is no conflict in the evidence, may as readily afford a difference of opinion as to the inferences and conclusions to be drawn therefrom, as in cases where the evidence is conflicting, and where there

NEGLIGENCE (Continued).

is room for such difference, the question is one of fact for the jury. (Id.)

10. **CONTRIBUTORY NEGLIGENCE OF PARENTS—CARE OF CHILD—DEBATABLE QUESTION.**—Parents are chargeable with ordinary care in the protection of their minor children; and where a young child had been told by its mother not to leave the house, and she supposed that he remained in the house, but the child left it contrary to her command, while she was engaged in washing, and wandered to another street, where the electric cars were running, and where he had been frequently told not to go, and was there run over and killed, the question whether the conduct of the mother, in permitting the child to be out of her sight for a period of fifteen or twenty minutes, without satisfying herself of its whereabouts, was, under all the circumstances, a want of ordinary care, is a fairly debatable question, which the jury are to determine. (Id.)
11. **LIABILITY FOR GROSS NEGLIGENCE—CONTRIBUTORY NEGLIGENCE NOT CONTROLLING.**—Where there is evidence tending to show that when the child went upon the railway track, he was a sufficient distance in advance of the approaching car to have enabled those in charge of the car, by the exercise of ordinary care, to have stopped before striking the child, such evidence tends to show gross negligence on the part of the defendant's servants, and to justify a finding for plaintiff, notwithstanding the negligence of the parents in permitting the child to be in the street. (Id.)
12. **DUTY TO AVOID INJURY TO NEGLIGENT PERSON.**—A party having an opportunity, by the exercise of proper care, to avoid injuring another, must do so, notwithstanding the latter has placed himself in the situation by his own negligence or wrong. (Id.)
13. **EVIDENCE—POVERTY OF PLAINTIFF—INABILITY TO EMPLOY SERVANTS TO KEEP CHILD—CONTRIBUTORY NEGLIGENCE—ERRONEOUS INSTRUCTIONS.**—Evidence that the plaintiff had no servants, and was too poor to employ any to keep his child, has no relevant or competent bearing upon the question whether he has given the child that degree of care which the law requires at his hands, and it is erroneous to instruct the jury that the fact that plaintiff is a poor man, if true, is a matter to be considered by them in determining whether or not he has been guilty of contributory negligence. (Id.)
14. **EXCESSIVE VERDICT—PECUNIARY VALUE OF SERVICES OF INFANT.**—The jury can award nothing in the way of penalty for the death of the child, nor for the sorrow or grief of his parents, but must confine their verdict to an amount which will justly compensate the father, who sues for the death, for the probable value of the services of the child during his minority, taking into consideration the cost of his support and maintenance during the early and helpless part of his life; and the deprivation of the comfort, society, and protection of the son can only be considered as affecting the pecuniary value of his services to the plaintiff; and a verdict for six thousand dollars for the death of an infant child four and a half years of age, at suit of the father, is excessive, and must be deemed to have been prompted by improper motives on the part of the jury. (Id.)

NEGLIGENCE (Continued).

15. **PLEADING—SEPARATE AVERMENTS OF DAMAGE—LOSS OF SOCIETY—LOSS OF EARNINGS—ELECTION.**—Where the complaint averred that by the death of the child, caused by the negligence of the defendant, plaintiff had been deprived of the society and companionship of said child, to his damage in the sum of fifty thousand dollars, and further averred that plaintiff had been deprived of his services and earnings of the reasonable value of eight thousand dollars, wherefore plaintiff demanded judgment in the aggregate sum of fifty-eight thousand dollars, it is not error for the court to refuse to require plaintiff to elect upon which of the two separate averments of damage he would rely, the matters alleged not being properly the subjects of separate averments, the loss of society, etc., being but an element in estimating the value of the services; and the objection to the manner of pleading is not to be reached by such motion, though it might, perhaps, be reached by a demurrer for uncertainty or ambiguity. (Id.)
16. **NEGLIGENCE OF BAILEE—INJURY FROM STORMS TO CHARTERED BARGES—PREVENTION OF INJURY—QUESTION OF FACT—NONSUIT.**—In an action for injury to chartered barges, where one count of the complaint was upon the terms of the charter covenanting to return the barges in good condition, etc., and a second count charged defendant with failing to exercise the ordinary care required of a bailee for hire, and the plaintiffs' evidence showed that the barges were placed by the defendant in shallow water, off a lee shore, and left exposed to the fury of a southeastern storm of unprecedented severity, that the barges were not designed to meet or withstand heavy weather, that defendant knew this when receiving them, and that injury to the barges might have been prevented by removing them to a sheltered shore, it is a question of fact for the jury whether the defendant did or did not exercise due care for the preservation of the barges, and it is error to grant a nonsuit for want of proof of negligence. (Southern P. Co. v. Von Schmidt Dredge Co., 387.)

See Banks; Common Carriers, 5, 6; Contract, 1; Factor, 6.

NEW TRIAL.

1. **ORDER GRANTING NEW TRIAL—DISCRETION—INSUFFICIENCY OF EVIDENCE—INFERENCES OF FACT FROM UNCONTRADICTED EVIDENCE—REVIEW UPON APPEAL.**—Where the grounds of a motion for a new trial include the insufficiency of the evidence to justify the decision, the appellate court cannot interfere with the discretion of the trial court to set aside the findings and to grant a new trial for such insufficiency, although the only conflict in the evidence consists of doubtful inferences of ultimate facts to be deduced from uncontradicted probative facts, it being exclusively within the province of the trial court to make all inferences and deductions of fact, where the facts necessary to support the judgment do not naturally follow as a necessary sequence from the probative facts, but must depend upon inferences to be deduced therefrom. (Cauhape v. Security Savings Bank, 82.)
2. **CONSTRUCTION OF CODE—LIMITATION OF POWER OF COURT TO SET ASIDE VERDICT OF ITS OWN MOTION—REVIEW UPON APPEAL.**—The superior

NEW TRIAL (Continued).

court has no power to set aside a verdict and to order a new trial of its own motion, without an application of either party, other than that expressly conferred by section 862 of the Code of Civil Procedure, in cases where there has been such a plain disregard by the jury of the evidence as to satisfy the court that the verdict was rendered under a misapprehension, or under the influence of passion or prejudice, or where there has been such a plain disregard of the instructions as to satisfy the court that the verdict was so rendered; and though such an order will be sustained, if the case is clearly within that section, notwithstanding an unauthorized reason is assigned therefor, yet, where the record discloses a case not specified in that section, an order of the court setting aside the verdict of its own motion must be reversed upon appeal. (*Townley v. Adams*, 382.)

3. **ACTION FOR BALANCE OF ACCOUNT—VERDICT FOR LESS THAN SUM CLAIMED—MOTION FOR NEW TRIAL—STATEMENT—INSUFFICIENCY OF EVIDENCE—IMPROPER SPECIFICATIONS.**—In an action for a balance due upon a mutual and open account, where the verdict and judgment for the plaintiffs were for a less amount than the sum claimed in the complaint, a mere general specification in the statement on motion of the plaintiffs for a new trial, that "the evidence was insufficient for the jury to find that plaintiffs were only entitled to judgment for the sum" specified in the verdict, without setting forth what additional items of credit were claimed to be established by the evidence, is merely equivalent to saying that the verdict should have been for a larger sum, and is not available as a specification. (*Wise v. Wakefield*, 107.)
4. **NEWLY DISCOVERED EVIDENCE—DILIGENCE—CUMULATIVE PROOF.**—A new trial cannot be granted for newly discovered evidence where the affidavits in support of the motion do not make a showing of diligence, and the newly discovered evidence appears to be merely cumulative to proof given upon the trial. (*People v. Brittan*, 409.)

See Appeal, 14; Banks, 5.

NOTICE. See Mortgage, 1.

NUISANCE. See Fence; Water Front, 16.

OAKLAND. See Water Front.

OFFICE AND OFFICERS. See Public Officers.

ORDINANCE. See Municipal Corporations.

PARENT AND CHILD. See Negligence, 8-15.

PARTITION.

1. **GRANT OF PUEBLO LANDS—REFERENCE TO OFFICIAL MAP—SUBSEQUENT CHANGE OF MAP—DIFFERENCE IN LOCATION OF LOT.**—Where a city sold and conveyed its title to all the lands of a pueblo lot by reference to an official map of the pueblo lands of the city then on file in

PARTITION (Continued).

the office of the city clerk, and designated by the name of the surveyor who made it, and the title to lands sought to be partitioned is deraigned from the city under deeds of portions of such pueblo lot, containing such reference, the partition must be made according to such official map, and not according to another official map subsequently adopted by the city, giving a different location of such pueblo lot. (*Sullivan v. Lumsden*, 664.)

2. **JURISDICTION OF EQUITY—VACATION OF DECREE—RE-PARTITION—MISTAKE OF REFEREE—USE OF WRONG MAP.**—Equity has jurisdiction to correct a mistake in a decree in partition, by setting it aside, and making a re-partition, where the mistake was extrinsic and collateral to the questions examined and determined in the original action for partition, and led the court to do what it did not intend to do, in continuing to the plaintiffs a piece of land not described or referred to in the complaint, or in the findings or interlocutory judgment, and which was not included in the title to the land sought to be partitioned, but was owned and possessed adversely by one not a party to the action, it appearing that the mistake originated in an incorrect use made by the referees of the lines indicated upon a second official map of the city then in force, which showed different boundaries of the lot sought to be partitioned from those fixed by a prior official map which was referred to in the grant made by the city, under which the title to the lot sought to be partitioned was deraigned, and under which the partition ought to have been made. (*Id.*)
3. **CONCEALED MISTAKE—DISCOVERY—REASONABLE DILIGENCE—LACHES NOT IMPUTABLE.**—The plaintiffs are not barred by delay and laches from maintaining a suit in equity to set aside the final decree of partition on the ground of mistake, brought within one year after the decree was entered, where it appears that there was nothing in the report of the referees, or in the record of the action for partition, or in the final decree, to indicate the mistake, but it was concealed by reference to the lands described in the complaint, and, without fault or negligence of the plaintiffs, was not discovered until after their remedy by motion or other legal process in the original action had expired, and that as soon as they received information which led them to suspect it, they took immediate steps to ascertain the facts, and employed counsel to prosecute the suit in equity. (*Id.*)
4. **PLEADING—DEMURRER TO COMPLAINT—PARTIES.**—A demurrer to the complaint in equity for failure to state a cause of action, and for a defect or misjoinder of parties defendant, is properly overruled, where the complaint states all the facts necessary to constitute a cause of action for relief in equity, and further stated that the parties therein named, plaintiffs and defendants, comprised all persons who owned, or claimed an interest in the pueblo lot of which partition was made, or any part thereof, or whose rights or interests were in any way affected by the decree in partition, or by the action to set it aside. (*Id.*)
5. **EXCHANGE OF QUITCLAIM DEEDS—MUTUAL MISTAKE—WANT OF CONSIDERATION—ANNULMENT—RE-PARTITION—FORM OF DECREE.**—Where the

PARTITION (Continued).

plaintiffs executed a quitclaim deed for a small portion of the lands claimed by them in exchange for a like deed from the appellant for a parcel of land outside of the lot of which partition was sought, and to which appellant had no valid claim or title, and it appeared that the deeds were exchanged by mutual mistake, and that plaintiff's deed was without any consideration, and the court sets out in its findings all the facts necessary to annul the deeds, and in the judgment of re-partition, decreed an allotment to each of the parties of the land originally owned by such party, it is not necessary that there should be a formal annulment of the deeds in the judgment, but it had the effect to vacate and set aside the deeds, and was sufficient in form. (Id.)

6. CONVEYANCE TO DEFENDANT PENDENTE LITE—FINDING.—In an action for partition, in which the evidence showed that one of the defendant's, *pendente lite*, had acquired all the title of the plaintiff in the land sought to be divided, a finding that the plaintiff had no right or interest in the premises is a finding of the ultimate fact proved by the deed from him, and is sufficient to sustain a judgment dismissing the action. (Mayer v. Mayer, 510.)
7. FINDING AGAINST FRAUD OR UNDUE INFLUENCE—EVIDENCE.—A specific finding that such deed was not procured by fraud or undue influence is not necessary, where no evidence tending to show such facts was offered by the plaintiff. (Id.)

See Deed, 1, 3.

PARTNERSHIP.

CERTIFICATE—ACTION BY ASSIGNEES—ASSIGNMENT TO MEMBER OF FIRM.—

Though persons doing business as partners under a fictitious name cannot maintain any action upon or on account of any contracts made or transactions had in their partnership name, until they have first filed and published the certificate of partnership, as required by sections 2466 and 2468 of the Civil Code, yet their assignor may maintain such action, though there be no certificate of partnership filed and published; and the fact that the assignee was a member of the firm is immaterial. (Gray v. Wells, 11.)

See Agency; Licn.

PEDIGREE. See Evidence, 13, 14.

PERJURY. See Criminal Law, 59-63.

PLACE OF TRIAL.

1. ACTION TO QUIET TITLE—CLAIM OF CITY TO WATERFRONT—CHANGE OF PLACE OF TRIAL—DISQUALIFICATION OF JUDGES—INTEREST IN DIMINUTION OF TAXES.—In an action brought by the city of Oakland to quiet title to the city waterfront, and to determine an adverse claim thereto by a corporation defendant, the interest of superior judges who reside in the city, in the diminution of taxes, as the result of revenue to be derived from the waterfront, in case of the success of the city, is not sufficiently direct and immediate to constitute a disqualification,

PLACE OF TRIAL (Continued).

or to entitle the defendant to a change of the place of trial on that ground. (*City of Oakland v. Oakland Water Front Co.*, 249.)

2. **CONSTRUCTION OF CODE—MEANING OF "INTERESTED."**—The word "interested," as used in section 170 of the Code of Civil Procedure, embraces only a direct, proximate, substantial, and certain interest in the result of the action, and does not embrace a remote, indirect, contingent, uncertain, and shadowy interest, such as that of a taxpayer in the result of an action to establish the title of a city to its waterfront. (*Id.*)

PLEADING.

1. **VARIANCE—STIPULATED TERMS OF CONTRACT—WAIVER OF OBJECTION—REVIEW UPON APPEAL.**—Where no objection was made in the trial court in any stage of the proceeding to a variance between the complaint and the stipulated terms of the contract agreed upon by the parties at the trial, a judgment for the plaintiff will not be reversed upon appeal on account of such variance. (*Colfax M. F. Co. v. S. P. Co.*, 648.)
2. **CAPACITY OF ADMINISTRATRIX TO SUE—PLEADING—DEMURRER—CURE OF DEFECT IN ANSWER.**—If the complaint by an administratrix is defective in not stating that the plaintiff was appointed administratrix by order and decree of the court, "duly given or made," such defect is cured where the defendant has not only recognized and recited in an agreement signed by him the representative capacity of the plaintiff, but has also described the plaintiff as administratrix of the estate in his answer; and the fact that a demurrer for want of capacity of the plaintiff to sue has been erroneously overruled will not prevent the curing of the defect in the complaint by the averments of the answer. (*Kreling v. Kreling*, 413.)

See *Common Carriers*, 4, 5; *Contract*, 13, 14, 20; *Eminent Domain*; *Evidence*, 10, 11; *Factor*, 6.

PRACTICE.

CONDITIONAL LEAVE TO AMEND COMPLAINT—INCREASE OF OFFER FOR JUDGMENT—DISCRETION.—Where the plaintiffs applied for leave to file an amended complaint setting forth additional items of account to conform to proofs, by which the balance of account in their favor was materially augmented, it is discretionary with the court to grant the amendment proposed, on condition that a previous offer of judgment by defendant be deemed increased to correspond with the increased demand of the complaint, and it is not an abuse of discretion to deny the application, where such condition was rejected by plaintiffs. (*Wise v. Wakefield*, 107.)

See *Appeal*; *Bill of Exceptions*; *Costs*; *Evidence*; *Findings*; *Instructions*; *Judgment*; *Mandamus*; *New Trial*; *Place of Trial*; *Receiver*.

PRINCIPAL AND AGENT. See *Agency*.

PROMISSORY NOTE. See *Consideration*, 1, 3, 6; *Gift*.

PROTECTION DISTRICT. See Water and Water Rights, 1-3.

PUBLIC OFFICERS.

1. **COUNTIES—SALARIES OF DEPUTIES—CONSTITUTIONAL LAW—ACT OF 1893.**—The provisions of section 173 of the County Government Act of 1893 (Stats. 1893, pp. 415, 416), empowering certain of the county officers in counties of the eleventh class to appoint a specified number of deputies, whose salaries are fixed by the act and made payable out of the county treasury, are not in conflict with section 11 of article I of the constitution, requiring all laws of a general nature to have a uniform operation, notwithstanding other provisions of the act, affecting counties of different classes, require the salaries of such deputies to be paid by their principals out of the gross sum allowed them for their compensation; nor with the various subdivisions of section 25 of article IV, forbidding the legislature to pass local or special laws in the cases enumerated therein; nor with the provisions of sections 4 and 5 of article XI, requiring the establishment of county governments, and the election or appointment of county officers, to be by general and uniform laws; nor with section 13 of the same article, prohibiting the legislature from delegating the power to make, control, appropriate, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects; nor with section 9 of article XI, forbidding any increase of compensation after election of public officers. (*Tulare County v. May*, 303.)
2. **DEPUTY ASSESSORS.**—The provisions of subdivision 21 of section 173 of such act, authorizing the assessor in counties of the eleventh class to appoint a number of deputies during the months of March, April, May, and June, at a salary of five dollars per diem, but not expressly providing for their payment by the county, should be construed as authorizing their payment out of the county treasury, in view of the provisions of section 216 of the act, as a contrary construction would necessitate the payment thereof by the assessor, out of his salary, which is fixed by the act at an amount which is entirely insufficient for such purpose. (*Id.*)
3. **CREATION OF ADDITIONAL JUDGESHIP.**—The provisions of section 612 of the act, authorizing the appointment of one additional deputy sheriff and two additional deputy clerks in any county in which an additional judge of the superior court is provided for, is general and uniform in its operation, and applies to the whole state, and takes effect in any county whenever an additional judgeship is created therein. Such provisions are constitutional. (*Id.*)
4. **COUNTY GOVERNMENT ACT—COMPENSATION OF SUPERVISORS HOLDING OFFICE AT PASSAGE OF ACT OF 1893.**—Under section 204 of the County Government Act of 1893 (Stats. 1893, p. 512) the compensation of supervisors in counties of the eleventh class, who were holding office at the date of its passage, was not affected thereby, but their compensation is regulated by the County Government Act of 1891. (*County of Tulare v. Jefferts*, 361.)
5. **OFFICE—VACANCY—CHIEF OF POLICE OF SACRAMENTO—ELECTION OF INELIGIBLE PERSON—INCUMBENCY—CONTEST—ANNULMENT OF ELECTION—APPOINTMENT—ELECTION FOR UNEXPIRED TERM.**—Where the election of a

PUBLIC OFFICERS (Continued).

person to the office of chief of police for the city of Sacramento was contested on the ground that he was not at the time of the election eligible to the office, and, as a result of the contest, his election was declared void and annulled on that ground, while he was an incumbent of the office, his predecessor having surrendered the incumbency to him upon his apparent election and qualification, the decision of a competent tribunal finally declaring his election void, created a vacancy within the terms of subdivision 10 of section 996 of the Political Code, which was properly filled by appointment until the ensuing municipal election, at which an incumbent was properly elected for the unexpired term. (People ex rel. Drew v. Rogers, 393.)

6. **RIGHTS OF PREVIOUS INCUMBENT—EFFECT OF SURRENDER.**—The right of the previous incumbent to hold over until his successor is elected and qualified has no application where he surrendered the incumbency of the office upon the apparent election and qualification of his successor, and he cannot thereafter resume his functions upon the ground that the election of his successor was declared void and annulled on the ground of his ineligibility, after he had entered upon the duties of the office. (Id.)
7. **QUO WARRANTO—EVIDENCE—JUDGMENT IN ELECTION CONTEST—DIFFERENT PARTIES—ESTOPPEL NOT MUTUAL.**—In an action brought by the attorney general in the name of the people upon relation of the previous incumbent of the office to oust the person elected for the unexpired term, the judgment rendered in an election contest annulling the previous election of the same person on the ground of ineligibility at suit of another elector, not a party to the quo warranto proceeding, is not admissible in evidence, and cannot estop the defendant from proving his original eligibility in that proceeding, there being no mutuality in the estoppel of the judgment, which does not bind the people. (Id.)
8. **CESSATION OF OFFICE—NEW CITY CHARTER—ABATEMENT—MOTION TO DISMISS—RIGHTS OF RELATOR—DAMAGES FOR USURPATION.**—The fact that the office in controversy has ceased through the adoption of a new city charter, is not ground for abatement of the *quo warranto* proceeding, as, under the statute governing the subject, if the relator should be found entitled to the office he would be entitled to recover any damages sustained through usurpation of the office by the defendant, and the prosecution of the proceeding is essential to determine whether he has a right to such damages. (Id.)
9. **TITLE TO OFFICE INCIDENTALLY INVOLVED—INADEQUATE REMEDY AT LAW—TAX LEVY BY CONFLICTING BOARDS OF SUPERVISORS—INQUIRY AS TO DE FACTO BOARD.**—The general rule that *mandamus* will not lie to determine the title to an office, applies when there is a plain, speedy, and adequate remedy at law to determine such title; but where the writ is sought to enforce a specific duty enjoined by law, and the remedies at law are inadequate, aid will not be refused merely because the occupancy or incumbency, or title to an office is incidentally involved, and in such case rights will be inquired into and determined so far as and no farther than may be necessary to the granting of the relief sought; and the fact that two distinct tax levies have been made by conflicting boards of supervisors, and that the inquiry upon

PUBLIC OFFICERS (Continued).

mandamus to the auditor to compel the entry of one of the levies, incidentally involves the determination as to which of the conflicting boards is *de facto* in office, and has the better apparent legal right to make the tax levy, constitutes no objection to the proceeding in *mandamus* against the auditor, (Morton v. Broderick, 474.)

10. PROCEEDING TO REMOVE BOARD OF SUPERVISORS—NEGLECT IN FIXING WATER RATES—CONSTITUTIONAL QUESTION APPROPRIATE TO APPEAL.—Where a proceeding was instituted in the superior court to remove a board of supervisors from office for neglect to fix water rates in the month of February, the question as to the constitutionality of the statute under which the proceeding was had is more appropriate to be determined upon appeal from the judgment removing the board, than upon *mandamus* to enforce a tax levy made by the *de facto* board of supervisors. (Id.)
11. NATURE OF PROCEEDING—JUDGMENT OF FORFEITURE—CIVIL ACTION—PARTIES.—Where a proceeding for the removal of a board of supervisors was in the form of a civil action, brought at the instance and in the name of a private individual, and the defendants were served with the summons required in a civil action, and the cause was conducted throughout as would be a civil trial, without a jury, a judgment of forfeiture of office rendered against the board in such action must be deemed rendered under civil process as respects the effect of an appeal therefrom; and the judgment cannot be upheld as having been rendered in a criminal proceeding, regardless of whether the statute contemplates a civil or criminal proceeding, inasmuch as a criminal proceeding could only be conducted in the name and by the authority of the people of the state and not by a private person. (Id.)
12. EFFECT OF CONFLICT OF INCUMBENCY—LEGAL RIGHT DISTINGUISHING OFFICERS DE FACTO.—Where conflicting boards or officers are acting simultaneously, each under a claim of right, since there cannot be two *de facto* boards or officers, that one alone will be recognized as the *de facto* board or officer which is acting at the time under the better apparent legal right; and, in such case, the title to the office *de jure* draws to it the possession *de facto*. (Id.)

See Appeal, 2, 3; Attorney General; Counties; Harbor Commissioners.

PUEBLO LANDS. See Partition, 1.

QUIETING TITLE. See Attorney General, 1; Place of Trial.

QUO WARRANTO. See Public Office, 7.

RAILROADS.

1. RAILROAD COMPANIES—CARRIAGE OF FRUIT—POWER TO CONTRACT—CONTINUOUS PASSENGER TRAIN SERVICE BEYOND TERMINUS.—A railroad company has power to contract to carry fruit by continued passenger train service over its own and connecting lines to a place of destination beyond the terminus of its own route. (Colfax Mountain Fruit Co. v. Southern Pacific Co., 648.)

RAILROADS (Continued).

2. SHIPPING ORDER—CONSTRUCTION OF CONTRACT—AGREEMENT TO FORWARD FRUIT TO DESTINATION NAMED—THROUGH FREIGHTS—LIMITATION OF CARRIER'S LIABILITY—INJURY FROM DELAY UPON CONNECTING LINE—ACTION FOR BREACH OF CONTRACT.—A contract in the form of a shipping order, made between the shippers and the Southern Pacific Company, upon one of its printed blanks used for regular freight service, to forward fresh fruit loaded in a Union Pacific car to Ogden Station, addressed to a firm in New York, with an agreement for through freight to that city, and concluding with the words: "Care C. & N. W. via Erie Dispatch, New York. Passenger train service. U. P. 32,009. Agent Southern Pacific Company will please forward, subject to conditions and agreements indorsed hereon," and bearing the following printed indorsement: "That the company agrees to forward the property to the place of destination named but its responsibility as a common carrier is to cease at the station where the freight leaves this road, where the property is to be delivered to connecting roads or carriers," is to be construed as a special contract for continuous passenger train service of the loaded fruit-car to New York, and the limitation of the carrier's liability beyond its own line does not affect an action not brought upon such liability, but brought against it by the shippers to recover damages for breach of the special contract, on account of delay in transmission of the car upon one of the connecting lines, causing injury to the fruit. (Id.)

3. AGREEMENT TO "FORWARD" FRUIT—MEANING OF CONTRACT.—The word "forward," used in the agreement to forward the fruit, is to be understood in the same sense throughout the contract; and inasmuch as the agreement that the fruit was to be "forwarded to Ogden" necessarily imported an agreement to carry or transport it to that place, so also the agreement "to forward the property to the place of destination" is to be understood as using the word "forward" in the same sense, and not in its technical or commercial sense, as putting the carrier in the position of a forwarder; and taking the agreement to forward the fruit, in connection with the agreement for passenger train service, and with the address, specified route, and place of destination of the fruit, the language employed in the contract imports an agreement to transport and carry the fruit through to New York by passenger train service. (Id.)

4. REQUEST FOR PASSENGER SERVICE OVER CONNECTING LINE—IMPLIED CONTRACT—INSTRUCTIONS—EXPRESS CONTRACT.—The contract does not import that the Southern Pacific Company should merely request passenger service over the Union Pacific and other connecting lines, and the law demanded no such request; but its implied contract demanded that it should deliver the fruit to the Union Pacific Company with instructions to further transport it, and there was no implied, but an express, contract that the fruit should have passenger train service thereafter. (Id.)

See *Municipal Corporations*, 11; *Negligence*, 6-15.

RAPE. See *Criminal Law*, 4, 5; *Evidence*, 12.

RECEIVERS.

1. **APPOINTMENT AFTER JUDGMENT—DIRECTION AS TO POSSESSION.**—Where a judgment has been rendered directing the defendant to satisfy a particular claim within a specified time, and, in default thereof, that a certain piece of real property described in the judgment be sold and the proceeds applied in payment of said claim, and, if insufficient, that judgment should be docketed against the defendant for the deficiency, the court has no jurisdiction, in an order thereafter made appointing a receiver, to direct him to take charge and possession of any property of the defendant other than that described in the judgment. (*Krelling v. Krelling*, 421.)
2. **STAY OF EXECUTION—ENTRY OF JUDGMENT.**—After the entry of the judgment, although there had been no appeal therefrom, and the defendant had obtained a stay of its execution until after the decision of his motion for a new trial, the court had jurisdiction to appoint a receiver of the land which it directed to be sold, and to give him authority to collect the rents thereof and to hold the same subject to its further order. (*Id.*)

RECORDING. See Mortgage, 1.

RESTRAINT OF TRADE. See Contract, 14-20.

ROBBERY. See Criminal Law, 67-86.

SALE. See Consideration; Contract, 13-20; Factor.

SAN DIEGO. See Municipal Corporations, 7-10.

SCHOOLS.

HIGH SCHOOL—ESTIMATE OF BOARD FOR TAXATION—TAXING BODY—LARGER DISTRICT INCLUDING CITY—CONSTRUCTION OF MUNICIPAL ACT.—By the municipal act of 1883, in all municipal corporations, up to and including those of the fifth class, the legislature has sought to place the public schools, including high schools, within the cities and towns, under the government and control of the municipalities, with power to levy such taxes for their maintenance as may be necessary, in addition to the state tax; and by the amendment of 1891 to section 795 of that act, a school district, which includes a city and additional territory, is to be deemed part of the city, and the high school board in such a district, which includes a city of the fifth class, must report the estimate required by section 1670 of the Political Code, to the legislative authority of the city, as the proper taxing body to levy a special tax for high school purposes, and not to the board of supervisors of the county. (*Chico High School Board v. Board of Supervisors of Butte County*, 115.)

SEAL. See Agency, 2.

SFDUCTION. See Criminal Law, 88.

SPECIFIC PERFORMANCE. See Lien, 1.

STATE LANDS. See Attorney General, 1; Water Front.

STATUTE OF LIMITATIONS.

1. **EJECTMENT—POSSESSION BY DEFENDANT PENDENTE LITE—EVICTION.**—Where an action of ejectment, commenced within the statutory period of limitation, is prosecuted to a final judgment for the plaintiff, and the defendant is evicted under a writ of possession issued thereunder, the latter, although he has remained in possession during the pendency of the action, and five years have elapsed from the time at which he first took possession until his eviction, does not acquire a new or independent title by prescription, which either he or his grantee can afterward enforce notwithstanding his eviction under the judgment in ejectment. (*Breon v. Robrecht*, 469.)
2. **POSSESSION CONFERS NO NEW RIGHTS.**—During the pendency of the action of ejectment, the defendant can acquire no new rights as against the plaintiff by the mere fact that he remains in possession. (*Id.*)

See Streets, Roads, and Highways; Trusts, 1, 2.

STOCK AND STOCKHOLDERS. See Justice's Court.

STREETS, ROADS, AND HIGHWAYS.

STREETS AND PUBLIC PLACES—CITY NOT ESTOPPED BY CONSENT DECREES—STATUTE OF LIMITATIONS INAPPLICABLE.—With respect to streets and public places dedicated to public use, the city is not estopped by consent decrees, and the statute of limitations does not apply. (*Oakland v. Oakland Water Front Co.*, 160.)

See Eminent Domain.

SUPERVISORS. See Counties; Public Officers, 4, 9-12.

SURETIES. See Appeal, 4, 5; Lien, 2.

TAXATION.

1. **DEED—YEAR OF ASSESSMENT.**—Under section 3783 of the Political Code, requiring a tax deed to recite the matters recited in the certificate of sale, and section 3776 requiring the certificate of sale to state "the name of the person assessed, the description of the land sold, the amount paid therefor, and that it was sold for taxes, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed," a tax deed reciting that the property was assessed "in the year 1883, for the year 1883 and 1889," is void for failure to state the year of the assessment. (*Simmons v. McCarthy*, 622.)
2. **STATUTORY REQUIREMENTS—VOID DEED.**—Where the statute prescribes the particular form of the tax deed, the form becomes substance, and must be strictly pursued or the deed will be held void, and the courts cannot inquire whether the required recitals are of material facts or otherwise. (*Id.*)
3. **CERTIFICATE OF SALE—EVIDENCE OF TITLE.**—Such a deed, when relied on as evidence of title, cannot be aided by reference to the certificate of sale, or by showing that the certificate complied with the statute.

TAXATION (Continued).

It is not even *prima facie* evidence that the title of the owner assessed is impaired, and cannot form the basis of a recovery. (Id.)

4. **AMOUNT PAID FOR LAND—RECITALS IN DEED.**—A tax deed, reciting that the amount of taxes levied on the property was seven dollars and fifty cents and that the costs and charges which have since accrued thereon amount to the further sum of one dollar and thirty-seven cents, and also that the purchaser was the bidder who was willing to take the least quantity of the land, and pay the taxes, costs, and charges due thereon, "which taxes, costs, and charges, including fifty cents for certificate of sale, amounted to the sum of eight dollars and eighty-four cents," and that the land was sold to the purchaser, "who paid the full amount of said taxes, costs, and charges," is void, for failure to definitely state the amount paid for the land, it being doubtful therefrom whether the amount paid was eight dollars and eighty-four cents or eight dollars and eighty-seven cents. In such a case the maxim *de minimis* does not apply. (Id.)
5. **NOTICE TO REDEEM—AFFIDAVIT—SERVICE ON OCCUPANT.**—Under section 3785 of the Political Code, a tax deed issued without an affidavit, showing that the notice of intention to apply for a deed required thereby to be given has been given, is void. Such affidavit must show on its face whether the property was occupied or unoccupied, and, if occupied, that the person upon whom the notice was served was at the time occupying it. A mere recital in the affidavit that the notice was served upon a lessee of the property, without a statement that he was occupying it, is insufficient, and parol evidence is inadmissible, in support of the deed, to show that the lessee was in the occupation thereof at the time of the service. (Id.)
6. **FEE DUE FOR NOTICE.**—A mere statement in the notice to redeem that three dollars would be due for the notice, without a statement that such sum was a portion of the "amount then due," did not impair its sufficiency. (Id.)
7. **PARAMOUNT LIEN.**—The legislature has power to make the lien of taxes paramount to all other liens upon land, so that where sale is made the purchaser takes title free from encumbrance. (California Loan and Trust Co. v. Weis, 489.)
8. **TITLE OF PURCHASER—LIEN OF PERSONAL PROPERTY TAX.**—Under section 3717 of the Political Code, every tax due upon personal property is a lien upon the real property of the owner thereof from and after 12 o'clock, M., of the first Monday in March in each year; and in pursuance of the provisions of article XIII, section 4, of the constitution, and of sections 3716 and 3788 of that code, such lien, and the title which a purchaser gets under a sale of the land for delinquent personal property taxes, is paramount to the lien of a mortgage which attached to the land prior to the lien of such tax. (Id.)
9. **DELINQUENT LIST—ADDITION OF PERSONAL PROPERTY TAX.**—In section 3764 of the Political Code, requiring the delinquent list to contain the amount of taxes and costs due, opposite each name and description, "with the taxes due on personal property added to taxes on real estate," the word "added" does not contemplate a mathematical computation, but merely that the amount of the delinquent personal

TAXATION (Continued).

property tax be subjoined or appended to the taxes on the real estate. (Id.)

10. **TIME OF DELINQUENT SALE—REPORT TO AUDITOR.**—In construing the conflict between section 3797 of the Political Code, as amended in 1891, and sections 3500, 3764, and 3768 of the same code, providing for the various steps to be taken by the tax collector for the publishing of the delinquent list, the sale for delinquent taxes, and his report to the auditor, it must be held that the date fixed by section 3797 for the tax collector's settlement with the auditor, to wit, the third Monday in June, is merely directory, and that the settlement may be had at some reasonable time after the sale, or that by clerical misprision the word "June" was inserted for the word "July"; and, so construed, a sale made on the 12th of July is valid. (Id.)
11. **MANDAMUS—DUTY OF AUDITOR TO COMPUTE AND ENTER TAX LEVY.**—It is the express statutory duty of the auditor to recognize, compute, and enter the tax levy in accordance with the rate fixed by the board of supervisors, and *mandamus* will lie to compel the performance of such duty. (Morton v. Broderick, 474.)
12. **TAX LEVY OF SAN FRANCISCO—SIGNATURE OF MAYOR NOT REQUIRED—CONSTITUTIONAL AMENDMENT—ACT OF 1897 INAPPLICABLE—MUNICIPAL AFFAIRS NOT SUBJECT TO GENERAL LAWS.**—The act of 1897 requiring the signature of the mayor to a tax levy does not apply to the city and county of San Francisco, as it deals with municipal affairs which, by the constitutional amendment of 1895, are exempted from the control of general laws in cities and towns not organized under the general scheme embraced in the municipal incorporation act, but which are organized under special charters; and the signature of the mayor of San Francisco is not required in order to the validity of a tax levy made by its board of supervisors. (Id.)

See Schools.

TRADE MARKS. See Injunction.**TRUSTS.**

1. **UNAUTHORIZED CONVEYANCES BY TRUSTEE—PROTEST OF BENEFICIARY—IMPLIED TRUST—LIMITATIONS—RUNNING OF STATUTE—REPUDIATION UNNECESSARY.**—Where a trustee of land, without the consent and against the protest of a beneficiary, made an unauthorized conveyance to the successor of another beneficiary, who took with full knowledge of the terms of the trust, the grantee took the legal title upon an implied trust in favor of the protesting beneficiary, as an involuntary trustee of a trust cast upon him by operation of law; and the statute of limitations against an action for an accounting and enforcement of the implied trust, commenced to run upon the acceptance of such conveyance, and the limitation which bars the action in four years from that time: nor is it necessary, in order to set the statute in motion, that the involuntary trustee should have attacked or repudiated the trust. (Nougues v. Newlands, 102.)
2. **RECOGNITION OF RIGHTS OF BENEFICIARIES—WRITTEN DECLARATION REQUIRED.**—A mere oral recognition by the involuntary trustee of the rights

TRUSTS (Continued).

of the beneficiaries cannot operate in law to change his position from that of an involuntary to that of an express trustee; but, in order to accomplish this, the trustee must have declared the trust by a signed instrument in writing. (Id.)

3. **WILL—DURATION OF TRUST—LIFE IN BEING.**—A provision in a codicil of a will that a previous unconditional bequest of five thousand dollars to the testator's niece, who was living at the time of his death, "is to be held in trust by my executors for her benefit and the interest is to be paid her monthly, at her death the same to be continued to her two children . . . until they are each twenty-five years of age, when the five thousand dollars shall be paid to them share and share alike," establishes two independent trusts, the first for the benefit of the niece, and the other for the benefit of her children. The first trust, being dependent upon a life in being, is valid, irrespective of any invalidity in the latter, and it was error for the court to decree a distribution of the fund absolutely to the niece. (Estate of Hendy, 636.)
4. **POWER OF ALIENATION.**—A trust is not invalid for undue suspension of the power of alienation, if, by its express terms or by necessary construction, its ultimate duration is always dependent upon lives in being. No absolute or certain term, however short, is valid. (Id.)
5. **CONSTRUCTION OF TRUST.**—The trust for the benefit of the children, who were in being at the death of the testator, is not invalid for undue suspension of the power of alienation, because in no possible event is the power of alienation suspended beyond the existence of lives in being. If the niece outlives her children, then the trust must cease upon her death; if she dies before her children, and they in turn both die before reaching the age of twenty-five years, the trust would terminate for lack of beneficiaries; when both, or either of them surviving, reach the age of twenty-five, the mother being dead, the trust also ceases. (Id.)

UNITED STATES COURTS. See Consuls.

VENDOR AND VENDEE.

CONTRACT FOR PURCHASE—POSSESSION BY VENDEE—IMPROVEMENTS.—A vendee who takes possession of land by virtue of the terms of an optional and executory contract for its purchase, does not enter as a tenant within the meaning of section 1019 of the Civil Code. His entry is by reason of the estate in the land which he claims in himself, and the improvements which he makes thereon are made in contemplation of his becoming the owner, and if permanently affixed to the land become a part of the realty as fully as if he were the absolute owner. Such improvements belong to the vendor in case the vendee subsequently declines to comply with his contract of purchase, and the vendee has no right to remove them from the land. (Pomeroy v. Bell, 635.)

VENUE. See Place of Trial.

WARRANTY. See Findings, 1, 2.

WATER FRONT.

1. **WATERFRONT OF OAKLAND—CONSTRUCTION OF STATE GRANT—"SHIP CHANNEL"—"SOUTHERLY LINE OF ESTUARY"—LINE OF LOW TIDE—BOUNDARY OF TOWN.**—The grant by the state to the town of Oakland of all lands upon its waterfront, lying within the corporate limits, as fixed by the act of May 4, 1852, "between high tide and ship channel," is to be construed most favorably to the state, and the boundary of the town by "the southerly line of the San Antonio creek, or estuary," is to be construed as being the southerly line of low tide of that estuary, and the boundary by "ship channel" is to be construed as intending the line of low tide; and the boundary of the town of Oakland as defined by that act, commencing at the intersection of the northeast line with the line of low tide on the northern branch of the estuary, follows the line of low tide on said branch to the mouth of the eastern basin, crosses said mouth, and continues along the line of low tide on the southern side of the estuary to its mouth in the bay, and thence follows the line of low tide northerly and easterly till it intersects the northeastern boundary; and the grant to Oakland was of the lands lying between high-water mark and ship channel, within these boundaries, and included nothing west of the line of low tide on the bay front, and nothing beyond the line of low tide on the north and west shore of the estuary, the estuary being itself navigable, and a part of "ship channel." (City of Oakland v. Oakland Water Front Co., 160.)
2. **LINE CROSSING EASTERN BASIN OF ESTUARY—EXTENSION OF SOUTHERLY LINE FROM HEADLAND TO HEADLAND.**—The rule in surveying boundaries defined by streams or other waters is to follow the stream or body of water, crossing the mouth of affluents or other inlets from headland to headland; and in determining the boundary of the town of Oakland, which extends from the intersection of the northeast boundary with the southerly line of San Antonio creek or estuary, "down the southerly line of said creek to its mouth in the bay," the legislative conception of the creek or estuary is that it has a head above its intersection with the northeastern boundary line, and a mouth in the bay, and the southerly line of the creek at low tide must cross the mouth of the eastern basin of the estuary from headland to headland, and cannot stop from going down the southerly line of the creek or estuary, to ascend and make the circuit of the eastern basin. (Id.)
3. **STRICT CONSTRUCTION OF MUNICIPAL BOUNDARIES—CONNECTION WITH STATE GRANT—GENERAL WELFARE.**—Where the boundaries of a gratuitous donation of lands from the state depend upon the boundaries of a municipal corporation fixed by the same act which makes the grant, the entire act, including the boundaries of the municipal corporation, is brought within the rule of strict construction against the grantee; but, considered without reference to the donation of lands, the grant of the municipal franchise is to be construed in a manner most conducive to the general welfare, and a strict construction of the act defining municipal boundaries will be enforced, where the general welfare and the rights of other communities require it. (Id.)

WATER FRONT (Continued).

4. REINCORPORATION OF TOWN AS CITY—CHANGE OF BOUNDARY NOT RETROACTIVE UPON PROPERTY RIGHTS—HIGH TIDE UPON ESTUARY—LEGISLATIVE CONSTRUCTION DISREGARDED.—The act of 1854 (S. a. s. 1854, p. 184) by which the town of Oakland was reincorporated as the city of Oakland, and the rights and duties of the town were devolved upon the city, and by which it was enacted that the boundaries of the city should be the same as those of the town, but which specifically described "the eastern and southern high tide line" of the slough and estuary of San Antonio, as one of the boundaries, with a proviso saving the rights of the citizens of Clinton and San Antonio to construct wharves at their respective sites, whatever effect it may have had in extending the limits of the city from and after its passage, cannot be allowed any retroactive effect upon the property rights of the city or other grantee, which must be determined by the proper judicial construction of the act of 1852, regardless of any subsequent change in the city limits; and the construction which the act of 1854, and the subsequent act of April 24, 1862, defining the boundaries, of the town of Oakland, sought to place upon the act of 1852, being erroneous, must be disregarded by the courts in determining the property rights depending upon that act. (Id.)
5. POWER OF STATE TO ALIENATE TIDE LANDS—PUBLIC RIGHTS OF NAVIGATION AND FISHERY—CHICAGO CASE—GRANT TO TOWN OF OAKLAND.—The state has full power to alienate lands which are covered and uncovered by the daily flux and reflux of the tides, subject only to the rights of the public to use them for the purposes of navigation and fishery; and such lands are alienable in private ownership where capable of reclamation without detriment to the public right, and especially where their reclamation will be of advantage to navigation and commerce; and there is nothing in the doctrine established by the case of *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, relative to the nonalienability of lands continually submerged beneath the waters of Lake Michigan in the harbor of Chicago, which is inconsistent with the right of the state of California to grant to the town of Oakland the mud flats and shoals along its waterfront lying between high and low tide, with a view to facilitate the construction of wharves and other improvements, it not appearing that such grant has impaired the power of succeeding legislatures to regulate, protect, improve, or develop the public rights of navigation and fishery. (Id.)
6. POWER OF OAKLAND TO ALIENATE ENTIRE WATERFRONT—QUESTION OF LEGISLATIVE INTENT—PUBLIC TRUST—INVALID TRANSFER TO PRIVATE CITIZEN.—The town of Oakland had no power to alienate its entire waterfront, unless such power was conferred upon it by the legislature; and whether it was conferred or not is a question of legislative intent, to be gathered from the terms of the statute construed with reference to its general scope and purpose; and the clear intent of the act creating the town of Oakland, and granting to it the tide lands along its water front, was to confer upon it a public trust for the improvement of commercial facilities by the erection of convenient wharves along its waterfront, and the regulation and col-

lection of wharfage and dockage for their use, which public trust it could neither delegate nor abdicate, nor was any power conferred upon it to alienate the tide lands, which were essential to the exercise of its power to erect wharves and regulate tolls; and an attempt by the town to invest a private citizen with the exclusive right to erect wharves and regulate tolls, and to transfer to him the entire waterfront, in consideration of his erecting wharves thereon, was unauthorized and void. (Id.)

7. LIMITED POWER OF ALIENATION—PROVISION FOR STREETS AND WHARVES—SALE OF LANDS BY PARCELS—SALE IN BULK VOID.—The intention of the law was that the streets of the town should be protracted to the waterfront, the intervening spaces divided into blocks and lots, and sold in subdivisions, in such manner as to preserve to the public ample means of access to the navigable waters of the bay and estuary, and to the municipal authorities ample space for the erection of wharves, piers, and docks, and if any reasonable measures to this end had been taken, a sale of the lands by parcels would have been a proper exercise of power by the municipal authorities; but a transfer in bulk to a private citizen, without any reservation of the right of access to navigable waters by which the town was largely surrounded, was a gross and evident excess of power. (Id.)
8. DISMISSAL OF SUIT IN EQUITY BY CITY—MANDATE OF SUPREME COURT—RES ADJUDICATA—QUESTION OF TITLE UNDETERMINED.—The dismissal of a suit in equity brought by the city of Oakland to set aside the grant of the waterfront assumed to have been made by the town as being fraudulent and void, which was dismissed in obedience to a mandate of the supreme court, whose decision left the question of title in the grantee undetermined, and adjudged that there was no ground in equity for the relief asked for, and that, if the grant was void, the city could disregard it, and assert its rights in any appropriate manner, is not *res adjudicata* upon the question of title, and does not estop the city to assert the void character of the grant in a subsequent action. (Id.)
9. LEGISLATIVE RATIFICATION OF TOWN ORDINANCE—CONFIRMATION OF VOID GRANT—POWER OF LEGISLATURE—QUESTION OF INTENTION UNDETERMINED.—It was within the power of the legislature to vest title to the tide lands on the Oakland waterfront in the grantee of the town under a void ordinance of the town, purporting to grant the same, by legislation clearly ratifying such ordinance; but the question whether the act of 1861, amending section 12 of the city charter so as to provide that "the ordinances of the board of trustees of said town are hereby ratified and confirmed," was intended to include a void special ordinance purporting to grant the entire waterfront to a private citizen, or whether it was only intended to include general ordinances of a legislative character, is one upon which the justices of the court are disagreed, and is undetermined. (Id.)
10. WATERFRONT LANDS NOT SUBJECT TO EXECUTION.—The lands between high and low tide along the waterfront of Oakland, being held by the town subject to the public trust of laying out streets through

WATER FRONT (Continued).

them, and using them as sites for wharves, docks, piers, and other essential aids to commerce, and to the traffic of a seaport town, were not subject to levy and sale under execution against the town. (Id.)

11. **VALID COMPROMISE UNDER LEGISLATIVE AUTHORITY—TITLE CONFIRMED IN WATERFRONT COMPANY—EXCEPTIONS—PUBLIC EASEMENTS.**—The compromise effected in April, 1868, between the city of Oakland, the Oakland Water Front Company, and the Western Pacific Railroad Company, pursuant to authority given by the act approved March 21, 1868, the passage of which was especially obtained by the parties, and by the terms of which the city council and mayor of Oakland were authorized and empowered to compromise, settle, and adjust any and all claims, demands, and controversies, and causes of action, in which the city was interested, was valid and effective; and after the date of said compromise, the city of Oakland had no ownership, as trustee or otherwise, of any portion of her waterfront, except those portions secured to her by the compromise, and such streets, thoroughfares, and other parcels as were previously dedicated to public use; and the title of the Oakland Water Front Company and its assigns to the entire waterfront was confirmed subject to those exceptions, and to the public easements and right of control in the city over the lands so dedicated. (Id.)
12. **REASONABLENESS OF COMPROMISE—DISCRETION OF MAYOR AND COUNCIL—ABSENCE OF FRAUD.**—The question as to the reasonableness or unreasonableness of the compromise, and as to what the city should exact or concede in making it, was a matter confided to the discretion of the mayor and council, and, in the absence of fraud, their judgment thereupon was conclusive. (Id.)
13. **DEMURRER TO COMPLAINT OF STATE—JUDICIAL NOTICE—GRANT OF TIDE LANDS TO OAKLAND—CHARTER AND AMENDMENTS—DESCRIPTION INCLUSIVE OF OTHER LANDS.**—In passing upon a general demurrer to a complaint by the state to quiet its alleged title to lands in the harbor of the cities of Oakland and Alameda, lying between high tide and ship channel, to a depth of twenty-four feet at ordinary low tide, in the bay of San Francisco and San Antonio creek, and to determine adverse claims made thereto by the city of Oakland and other defendants, and to restrain and abate obstructions therein, it is proper for the court to take judicial notice of the grant by the state to the town of Oakland of lands within its corporate limits lying between high tide and ship channel, made by the act of May 4, 1852, incorporating the town, and also of the act of March 25, 1854, incorporating the city as successor of the town, and of other acts amendatory of and supplemental to the charter of Oakland; but inasmuch as the description in the complaint is not coincident with a proper construction of the grant to the town, but appears to be inclusive of lands in navigable waters beyond the line of low tide, and may include lands lying in the eastern basin of the estuary, outside of the corporate limits of the town, and the complaint states a cause of action in favor of the state, the demurrer thereto is improperly sustained. (*People v. Oakland Water Front Co.*, 234.)

14. **CONTRACTION OF SOUTHERN BOUNDARY OF OAKLAND—RENUNCIATION OF PART OF GRANT—RESUMPTION OF CONTROL BY STATE.**—The state having, by recent legislation, contracted the southern boundary of Oakland so as to exclude from its limits the southern half of the estuary, such exclusion amounts to a renunciation on the part of the city, and resumption by the state of the control of so much of the grant as may have been covered by the excluded portion of the city. (Id.)
15. **CONDITIONS SUBSEQUENT—FORFEITURE OF GRANT—PLEADING.**—The question whether the grant was forfeited to the state by breach of conditions subsequent cannot be considered, where the allegations of the complaint of the state are not so framed as to support an action to enforce such a forfeiture. (Id.)
16. **INJUNCTION—OBSTRUCTION OF NAVIGATION BY GRANTEEES OF STATE—PUBLIC NUISANCE—INDEPENDENT ACTS OF SEVERAL DEFENDANTS—MISJOINDER—SEVERAL ACTIONS NECESSARY.**—A grant by the state of the soil under navigable waters carries with it no right to obstruct navigation, and the state may enjoin its grantees or their successors from erecting or maintaining structures which will impair or interfere with the exercise of the public right of navigation, so as to constitute a public nuisance; but where each of several defendants is acting independently of the others in the erection and maintenance of separate structures obstructing navigation, it is a misjoinder of causes of action and of parties defendant to join them in one action to abate nuisances, but each must be sued in a separate action. (Id.)
17. **MUNICIPAL CORPORATIONS—WATER LOTS—WATERFRONT LINE—WHARVES.**—When the state establishes the permanent waterfront or harbor line for one of its municipalities, and authorizes the sale of land lying between such line and the uplands, it is a legislative declaration that these lands may pass into private ownership without interference with the public rights of navigation and fishery. They may then be reclaimed from the waters by their owners and devoted to any of the uses to which uplands are put, or, if suitably located, and there be no restriction in the grant, they may, under legal sanction, be covered with wharves, docks, and like structures. (*Shirley v. City of Benicia*, 344.)
18. **RIGHTS OF ABUTTING OWNERS.**—It is the owners of land abutting upon the waterfront line who, under legal sanction, may build into the deeper public waters beyond. The owners of inner water lots have not such right. (Id.)
19. **BENICIA—ERECTION OF PUBLIC WHARVES ON STREETS.**—The city of Benicia, having reserved a strip of land for public streets, between its waterfront line and the lands which it sold into private ownership, has the right, although such streets are covered with water, to convert the same into public wharves, or to build such structures along them or at their termini, and such use is no invasion of the rights of proprietors of abutting lands, lying between the streets and the uplands. (Id.)

See Place of Trial.

WAY. See Eminent Domain.

WATER AND WATER RIGHTS.

1. **INJUNCTION—ACTS OF SUPERVISORS INCREASING FLOW OF WATERCOURSE—CHANGE OF CHANNEL OF ANOTHER WATERCOURSE—PROTECTION DISTRICT—FINDING OUTSIDE OF ISSUES.**—An injunction will lie to restrain the supervisors of a county from changing the channel of a natural watercourse so as to increase the flow of water in another watercourse which is riparian to plaintiff's land, to the injury of his land and the improvements thereon; and where there is an attempt at justification in the answer, on account of the establishment of a protection district, not including plaintiff's land, for the benefit of which district the channel was changed, a finding in regard to such protection district is outside of the issues, and must be disregarded. (*Rudel v. County of Los Angeles*, 281.)
2. **AUTHORITY OF SUPERVISORS OVER PROTECTION DISTRICTS.**—The authority of the supervisors over protection districts, established under the act of March 27, 1895, to provide for their formation, is confined to the limits of the district, and does not extend to property situated outside thereof. (*Id.*)
3. **DRAINAGE—SERVIENT TENEMENT—NATURAL FLOW—ARTIFICIAL INCREASE OF FLOW.**—The rule that land lower than that from which drainage comes to it is a servient tenement, and is subject to drainage from the lands above, is confined to the natural flow of water descending upon it without artificial increase, and does not justify the upper proprietor in gathering and concentrating surface water from a large area in a single channel, and precipitating it in volume upon the servient tenement. (*Id.*)
4. **WATER RATES—VALIDITY OF MUNICIPAL ORDINANCE—COMPENSATION TO WATER COMPANY—CONSTITUTIONAL LIMITATION.**—An ordinance fixing water rates to be collected by a water company supplying water to the inhabitants of a city must allow a just and reasonable compensation to the water company for the property used and the services furnished by it; and if the ordinance allows no compensation or reward therefor, it is invalid, as violating the constitutional limitation that property cannot be taken for public use without just compensation. (*San Diego Water Co. v. City of San Diego*, 536.)
5. **ACTION OF MUNICIPAL BODY NOT A JUDICIAL PROCEEDING.**—Whether the fixing of water rates by the governing body of a municipal corporation be called a legislative, a judicial, or an administrative act, it is not an adversary judicial proceeding, such as will conclude or divest private rights, but it is a proceeding on the part of such governing body, to which neither the water company nor the rate-payers are parties, and conducted without notice to them; and though it is, within proper limits, a legitimate exercise of governmental powers, yet when carried so far as to deprive any person or corporation of property without just compensation, it is an unlawful exercise of such power, and is void. (*Id.*)
6. **JURISDICTION OF COURTS—EXTENT OF REVIEW OF MUNICIPAL ACTION—MIXED QUESTION OF LAW AND FACT—EVIDENCE.**—The courts have jurisdiction to review the action of the governing body of a municipal corporation in fixing rates for the supply of water to its inhabitants, not as appellate tribunals for the purpose of revising the correct-

WATER AND WATER RIGHTS (Continued).

ness of its determination, but to the extent of ascertaining whether the rates fixed will allow a reward for the property used and the services furnished by the water company, or whether the power exercised has been carried beyond the constitutional limitation by taking its property for public use without just compensation; and that is a mixed question of law and fact, to be decided by the court upon the evidence produced before it, without reference to the evidence upon which the governing body acted. (Id.)

7. **REGULATION OF PUBLIC BUSINESS—POWER TO FIX RATES WITHOUT NOTICE—DUE PROCESS OF LAW.**—The business of supplying cities and towns with water is so far public in its nature that the state may impose such conditions and restrictions upon its exercise as may be thought proper, and a water company entering upon that business, under the present constitution, is bound to submit to the conditions and restrictions thereby imposed upon it; and the provision of section 1 of article XIV of the state constitution is not opposed to the constitution of the United States, in that it deprives the water company of its property without due process of law, because not providing that notice shall be given of the fixing of water rates to those whose rights are affected, and for an opportunity for them to appear and defend. (Id.)
8. **CONSTRUCTION OF STATE CONSTITUTION—TIME OF ACQUISITION OF RIGHTS IMMATERIAL—REASONABLE RATES—JUST COMPENSATION—REDDRESS FOR ARBITRARY ACTION.**—It was not the intention of the framers of the state constitution to distinguish between rights then existing and those to be thereafter acquired in the business of supplying cities and towns with water, nor was it their intention to confiscate private property, but the meaning of the section in regard to the fixing of rates for such business is, that the governing body of the municipality, upon a fair investigation, and with the exercise of judgment and discretion, shall fix reasonable rates and allow just compensation; and if they attempt to act arbitrarily without investigation, or without the exercise of judgment and discretion, or fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty and go beyond the powers conferred upon them, and the court is competent to afford redress therefor. (Id.)
9. **BASIS FOR FIXING WATER RATES—VALUATION OF PLANT—COST OF CONSTRUCTION.**—In the fixing of water rates, the valuation of the plant is the basic element upon which the investigation rests; and the original cost of construction is simply an element to be considered in fixing the present valuation; and the municipality must fix a fair and just rate for the water based upon the actual value of the plant. [Per Garoutte, J., Temple, J., Harrison, J., and Beatty, C. J.] (Id.)
10. **EMINENT DOMAIN—COMPENSATION FOR PROPERTY APPROPRIATED TO PUBLIC USE—REWARD FOR MONEY PROPERLY EXPENDED.**—The state has in effect appropriated the water and plant of the water company to public use, and is bound to provide a just compensation for that use, to

WATER AND WATER RIGHTS (Continued).

be ascertained, not upon the basis of the market value of the property, nor upon what it would cost to replace it, but upon the basis of the revenue that the money reasonably and properly expended in the construction of the works actually in use is capable of producing. [Per Van Fleet, J., Henshaw, J., and McFarland, J.] (Id.)

11. **LIMIT OF JUST COMPENSATION—JUDICIAL QUESTION—LOWEST CURRENT RATE OF INTEREST.**—The question of just compensation is a judicial question, to be determined in the ordinary course of judicial proceedings; and the water company is entitled to a net compensation at least equal to the lowest current rate of interest on the basic value of its plant, properly ascertained. [Per Van Fleet, J., Henshaw, J., McFarland, J., and Beatty, C. J.] (Id.)
12. **POWER OF COURT TO DETERMINE JUST COMPENSATION.**—The court has no power to determine any limit of just compensation, but only to inquire whether some compensation, however small, is allowed; and the question of the extent or limit of such compensation is for the municipal body alone to determine. [Per Garoutte, J., Temple, J., and Harrison, J.] (Id.)
13. **BONDED DEBT OF WATER COMPANY.**—Whether the basis for just compensation to the water company be considered to be the reasonable cost or the actual value of the plant, its bonded indebtedness is to be disregarded in ascertaining such compensation. (Id.)
14. **DEPRECIATION OF PLANT BY USE—REPAIRS—SINKING FUND.**—In determining the question whether the water company is compensated by the rates established by ordinance, ordinary repairs should be charged to current expense, and substantial reconstruction or replacement should be charged to the cost of construction; but no percentage upon the investment can be charged as a sinking fund, to be added to operating expenses, as a general provision against depreciation of the plant by use. (Id.)
15. **COST OF PLANT—FINDING AGAINST EVIDENCE.**—The evidence reviewed as to the cost of the plant of the plaintiff water company, and a finding as to such cost, held unsupported by the evidence. [Per Van Fleet, J., Henshaw, J., McFarland, J., and Harrison, J.] (Id.)
16. **DUTY OF COUNCIL IN FIXING RATES—PUBLIC INVESTIGATION—NOTICE—RIGHTS OF WATER COMPANY—UNFAIR REFUSAL OF REQUEST.**—An investigation by a city council for the purpose of fixing water rates ought to be held publicly, and upon such reasonable notice of the times and places of meetings as will enable those interested to be present; and it is the duty of the council, when requested by the water company, to give it a reasonable opportunity to be heard, not for the purpose merely of presenting its own evidence, but also of explaining or overcoming, if it can, evidence presented by others; and where the right of the water company, upon its request to be present throughout such an investigation and to rebut or overcome evidence adduced against it, was denied by the council and by its committee of investigation, the unfairness in the investigation overcomes the presumption of the correctness of

WATER AND WATER RIGHTS (Continued).

its decision. [Per Van Fleet, J., Henshaw, J., and McFarland, J.] (Id.)

See Municipal Corporations, 12, 22.

WHARF. See Harbor Commissioners; Water Front, 17-19.

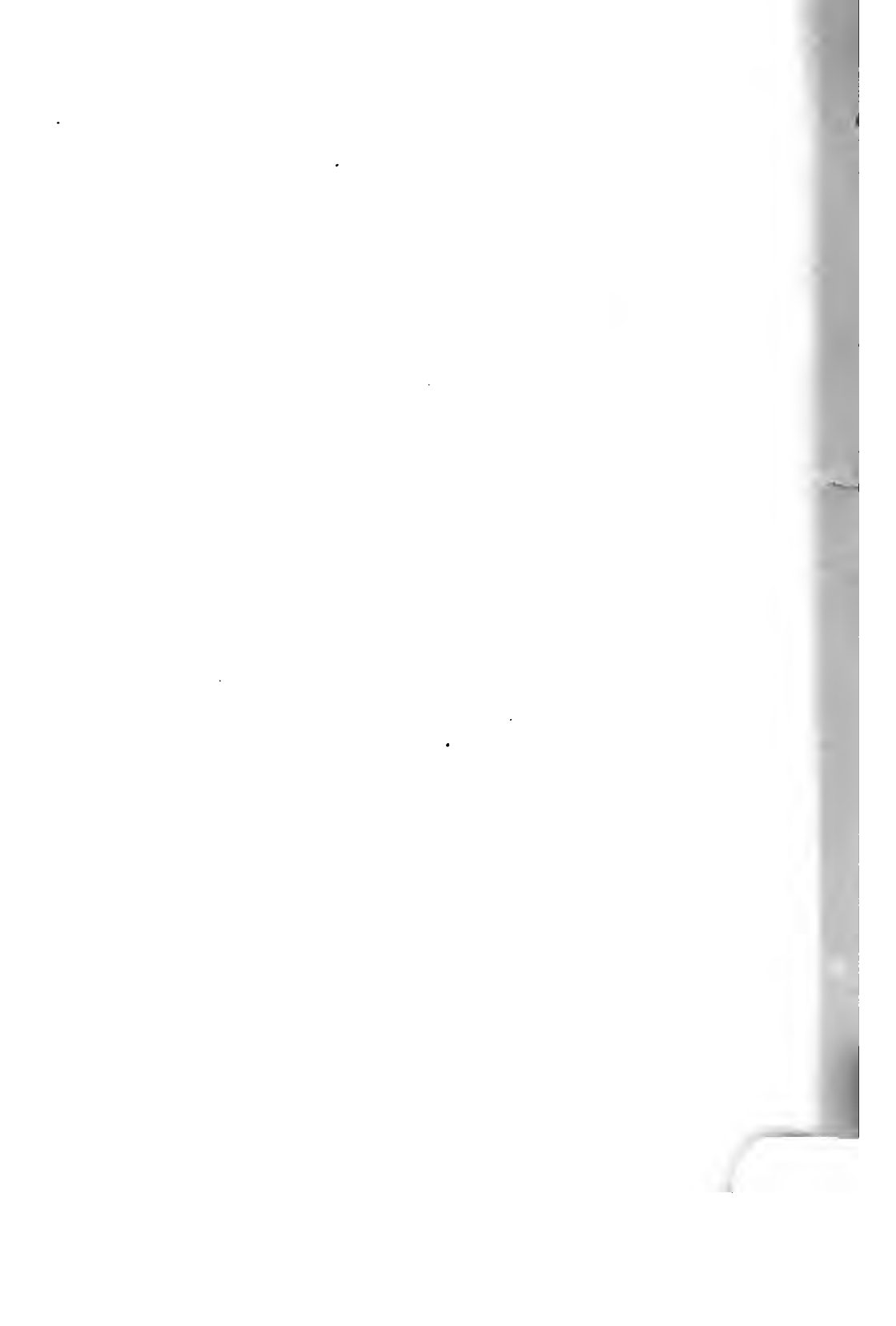
WILLS.

1. **LETTER ADDRESSED TO UNDERTAKER—DISPOSITION OF BODY—REFERENCE TO ADMINISTRATOR—LACK OF TESTAMENTARY CHARACTER.**—A letter addressed to an undertaker, the main object of which was to provide for a disposition of the body of the writer in case of death, concluding with a statement that the estate of the writer must pay all expenses accruing, and that her brother will take charge of her estate, and be the sole administrator without bonds, to trade, sell, or occupy, as may seem to him fit, is not of a testamentary character, and the language of the concluding paragraph is more consistent with a construction that she was referring to a will already made, or to be made, than that she had the *animus testandi* when writing the letter. (Estate of Meade, 428.)
2. **TESTAMENTARY INTENTION MUST BE CLEARLY MANIFESTED—RIGHTS OF HEIRS.**—The intention of the deceased that a paper should stand for a last will and testament must be plainly apparent, and the heirs at law are not to be disinherited unless such intention is clearly manifested, and expressed with legal certainty. (Id.)

See Estates of Deceased Persons; Evidence, 2-4; Trusts, 3-5.

WITNESS. See Evidence.

WRIT OF REVIEW. See Certiorari.





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